Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

General Notices

The following Treasury Decision, originally published in the CUSTOMS BULLETIN, Vol. 18, No. 6, February 22, 1984, is being reprinted with a corrected effective date.

This document changes from September 30, 1984, to October 30, 1984, the effective date of a final rule published as T.D. 84-39 on February 10, 1984 (49 FR 5092; FR Doc. 84-3707), which amended section 101.3, Customs Regulations (19 CFR 101.3), relating to the field organization of the Customs Service. The original effective date of T.D. 84-39 was suspended from June 1, 1984, to September 30, 1984, by a document published on June 8, 1984 (49 FR 23832; FR Doc. 84-15306).

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19 CFR Part 101

(T.D. 84-39)

Customs Regulations Amendment Relating to the Customs Field Organization—Bridgeport, Connecticut

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule; change of effective date.

SUMMARY: This document changes from September 30, 1984, to October 30, 1984, the effective date of a document which amended the Customs Regulations relating to the field organization of the Customs Service. Because of the language of Pub. L. 98-573, the Trade & Tariff Act of 1984, the effective date of T.D. 84-39 must be changed to October 30, 1984, the date the President signed Pub. L. 88-573. This is the new effective date of changing the status of the Bridgeport, Connecticut, Customs district by placing it under the Boston, Massachusetts, Customs district. T.D. 84-39 was published in the Federal Register on Friday, February 10, 1984 (49 FR 5092; FR Doc. 84-3707). The original effective date of the document was suspended from June 1, 1984, to September 30, 1984, by a document published on June 8, 1984 (49 FR 23832; FR Doc. 84-15306).

EFFECTIVE DATE: December 18, 1984.

FOR FURTHER INFORMATION CONTACT: Renee De Atley, Office of Inspection and Control, U.S Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229 (202-566-8157).

The amendments to 19 CFR 101 published in the Federal Register on Friday, February 10, 1984 (49 FR 5092; FR Doc. 84-3707) are suspended until October 30, 1984.

Dated: December 12, 1984.

ROBERT P. SCHAFFER,
Assistant Commissioner,
(Commercial Operations).

[Published in the Federal Register, December 18, 1984 (49 FR 49091)]

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19 CFR Part 151

Proposed Customs Regulations Amendments Relating to Approval of Commercial Gaugers and Accreditation of Commercial Testing Laboratories

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of extension of time for submission of comments.

SUMMARY: This document extends the time for comments from interested members of the public with respect to a proposal to amend the Customs Regulations to provide procedures for Customs approval of commercial gaugers (including public gaugers) who perform weighing, measuring, and/or gauging of certain commodities. The document also proposes a procedure for Customs accreditation of commercial testing laboratories. A notice inviting the public to comment on the proposal was published in the Federal Register on October 18, 1984 (49 FR 40882). Comments were to have been received on or before December 17, 1984. Customs has been requested to extend the comment period because of the complexity of the issues involved. Inasmuch as the request has merit, additional time for comments is warranted before a final determination is made on the proposed change. Therefore, the comment period is being extended to January 16, 1985.

DATE: Comments must be received on or before January 16, 1985.

ADDRESS: Written comments (preferably in triplicate) may be addressed to the Commissioner of Customs, Attention: Regulations Control Branch, Room 2426, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229.

All comments received in response to this notice will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552) and § 1.6, Treasury Department Regulations (31 CFR 1.6), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), between the hours of 9 a.m. to 4:30 p.m. on regular business days, at the Regulations Control Branch, Headquarters, U.S. Customs Service, Room 2426, 1301 Constitution Avenue NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Roger J. Crain or Carolyn E. Damon, Technical Services Division, Room 7113, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229 (202-566-2446).

Dated: December 18, 1984

JOHN P. SIMPSON,
Director,
Office of Regulations and Rulings.

[Published in the Federal Register, December 19, 1984 (49 FR 49853)]

U.S. Court of Appeals for the Federal Circuit

(Appeal Nos. 84-693 and 84-694)

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL.,* APPELLEES, *v.* THE UNITED STATES AND ZENITH RADIO CORPORATION, APPELLANTS.

(Decided: December 13, 1984)

Jane K. Albrecht, Office of General Counsel, of Washington, D.C., argued for appellant United States. With her on the brief were *Michael H. Stein,* General Counsel and *Michael P. Mabile,* Assistant General Counsel for Litigation.

Frederick L. Ikenson, of Washington, D.C., argued for appellant Zenith Radio Corporation. With him on the brief was *J. Eric Nissley,* of counsel.

Stuart M. Rosen, Weil, Gotshal & Manges and *Gail Cumins,* Sharretts, Paley, Carter and Blauvelt, P.C., of New York, New York, argued for appellees.

A. Paul Victor and *Carmen M. Shepard,* Weil, Gotshal and Manges, of New York, New York, of counsel.

Ned H. Marshak, Sharretts, Paley, Carter & Blauvelt, P.C., of New York, New York, of counsel.

Paul D. Cullen, Collier, Shannon, Rill & Scott, of Washington, D.C., was on the brief for Amicus Curiae.

Appealed from: U.S. Court of International Trade: *Judge* WATSON.

Before NIES, *Circuit Judge,* NICHOLS, *Senior Circuit Judge,* and NEWMAN, *Circuit Judge.*

NIES, *Circuit Judge.*

Upon review under 19 U.S.C. § 1675(b) (Supp. IV 1980), the International Trade Commission (Commission) determined that the U.S. television industry would be threatened with material injury if an existing antidumping order on television receivers from Japan, T.D. 71-76, were to be modified or revoked.[1] The Court of International Trade reversed, holding that the Commission's determination was not supported by substantial evidence.[2] The United States

* The names of the appellees are listed in the appendix to this opinion. An *amicus curiae* brief was accepted on behalf of the Committee to Preserve American Color Television (a.k.a. COMPACT), the Independent Radionic Workers of America, the International Brotherhood of Electrical Workers, and the International Union of Electronic, Electrical, Technical, Salaried and Machine Workers, AFL-CIO-CLC.

[1] *Television Receiving Sets from Japan,* 46 Fed. Reg. 32,702 (1981).

[2] Reported at 569 F.Supp. 853 (Ct. Int'l Trade), *reh'g denied,* 573 F.Supp. 122 (1983).

and Zenith Radio Corporation appeal that decision to this court under 28 U.S.C. § 1295(a)(5) (1982). We reverse.

BACKGROUND

In 1971, to protect the U.S. television industry from injury by sales of television receivers from Japan at less than fair value (LTFV), an antidumping duty order (T.D. 71-76) was issued imposing the assessment of dumping duties on such imports.[3] Even with the antidumping order in effect, the condition of the U.S. television industry deteriorated. In 1977, the Commission, pursuant to 19 U.S.C. § 2251 (1976), recommended a restriction on the quantity of imports of color television receivers from Japan. The President, acting on that recommendation, implemented an orderly marketing agreement (OMA) with the Japanese. The OMA stayed in effect until May 1980, when it was allowed to expire following the Commission's review and determination, pursuant to 19 U.S.C. § 2253(i) (1980), that a restriction on the quantity of imports was no longer necessary inasmuch as the "imports of Japanese [color] sets no longer pose a serious concern to the domestic industry." [4]

Following the elimination of the OMA restriction, Matsushita Electric Industrial Co., Ltd., and the other appellees of this appeal (collectively "Matsushita"), pursuant to 19 U.S.C. § 1675(b)(1) (Supp. IV 1980),[5] petitioned the Commission to review T.D. 71-76, contending that revocation of that order would not be injurious to the U.S. industry for the same reasons that the OMA was no longer necessary. The petitions were opposed by various U.S. interests, including appellant, Zenith Radio Corporation, which argued that circumstances had not changed sufficiently to warrant review. Nevertheless, an investigative review was undertaken pursuant to 19 C.F.R. § 207.45 (1981) (implementing 19 U.S.C. § 1675(b) (Supp. IV 1980)) to determine "whether an industry in the United States would be materially injured, or would be threatened with material injury . . . if the antidumping order were to be modified or revoked." [6]

In its review, the Commission compiled relevant data, sent out questionnaires to domestic producers, importers, and purchasers of television receivers, and held 2 days of hearings during which counsel for all parties and interested members of the public were allowed to testify, present witnesses, present oral argument, question

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[3] 36 Fed. Reg. 4597, 5 Cust. Bull. 151 (1971). The antidumping "order" was technically a dumping "finding" under the predecessor statute in effect in 1971. However, dumping findings and antidumping orders are treated identically for purposes of a Section 751(b) review.

[4] *Color Television Receivers and Subassemblies Thereof,* Inv. No. TA-203-6, USITC Pub. No. 1068 at 1 (1980).

[5] 19 U.S.C. § 1675(b)(1) (Supp. IV 1980) provides:

> (b) Reviews upon information or request.
>
> (1) In general. Whenever . . . the Commission receives . . . a request for the review of . . . an affirmative determination made under section . . . 1673d(b) of this title, which shows *changed circumstances* sufficient to warrant a review of such determination, it shall conduct such a review after publishing notice of the review in the Federal Register. [Emphasis added.]

[6] At the time the investigation was instituted, § 207.45 was under revision. The amended version (quoted above), effective March 23, 1981, was used by the Commission in the investigation.

opposing counsel and witnesses, and answer questions from the panel of Commissioners.

On June 4, 1981, the Commission determined by a vote of three to one that the U.S. industry would be threatened with material injury if T.D. 71–76 were to be modified or revoked.

The Commission's Determination

The Commission began its analysis by noting that the results of the investigation into continuation of the 1977 OMA did not dispose of the issues faced here for three principal reasons:

(1) The two investigations, according to the Commission, are fundamentally different, an OMA investigation involving, for example, a much more rigorous standard of injury than that in an antidumping investigation;

(2) Since the 1980 OMA review was made, imports from Japan had bottomed out and had started to climb again; and *most importantly,*

(3) The 1980 OMA review *assumed the continuation* of T.D. 71–76.

The Commission noted that while the statute sets forth no specific standard for conducting an antidumping review under 19 U.S.C. § 1675(b), the implementing regulation, 19 C.F.R. § 207.45(a), according to the Commission, required it to:

> Consider the relevant facts and circumstances as they currently exist, assess the intentions of the exporters and importers as to the prospective revocation or modification of the order, and project those factors into the future, to determine whether an industry in the United States would suffer material injury, or the threat thereof, or whether the establishment of an industry would be materially retarded, as a result of the changed behavior of the exporters and importers upon being freed from the pricing constraints of the order.

The Commission premised its determination on the assumption that LTFV sales *would resume or continue* upon revocation of the antidumping order. This premise was seen to follow from the alternative routes available to a party seeking relief from an outstanding antidumping order. Under 19 C.F.R. § 353.54 (1981), an importer may seek exemption from or revocation of a dumping order through the Commerce Department by showing dumping has ceased (ordinarily for a period of two years) and, most significantly, by agreeing not to dump in the future. The importers in this case did not utilize this relief provision.[7] Moreover, the importers introduced no direct testimony with respect to how removal of the order would or would not alter their pricing and volume decisions. In the absence of satisfactory evidence with respect to the importers' in-

[7] At oral argument, appellees contended that, although they had initially pursued this avenue of relief, they were "stuck at the ITA [Commerce] by virtue of its delinquency in not processing the information which had been submitted," and, thus, turned to the ITC for relief under § 1675(b). Sony Corporation, on the other hand, had obtained exemption from T.D. 71–76 in 1975.

tentions, the Commission found itself forced to rely on the capabilities of the Japanese producers and on general economic factors to assess their future behavior. Though evidence on Japanese production capacity was also difficult to obtain, the indications, according to the Commission, were that the Japanese had adequate flexibility to supply any market on relatively short notice. Given the strong price competition in the U.S. market, the Commission concluded it had no basis to believe that dumping would not resume or margins increase upon revocation of the order.

The question remained, however, whether dumping would occur to such an extent as to be materially injurious. The Commission then set forth three scenarios which led it to conclude that imports were likely to increase to the material injury of U.S. industry.

First, the Commission noted that its investigation disclosed that the domestic market, despite dramatic change in the past ten years, remained highly competitive with relatively low profitability. The Commission reasoned that, if demand for televisions continued to rise in the United States (as predicted), renewed or increased dumping could keep prices artificially depressed, allowing the Japanese to increase market share for both imports and domestic production through LTFV sales, which had been found to be injurious in 1971.

Second, the Commission reasoned that the Japanese could be expected to use dumped imports to increase their market share for any short-term, cyclical increases in demand, while gradually increasing production capacity of their U.S. subsidiaries to maintain it. The Commission pointed out that the phenomenon appeared to be occurring even with the antidumping order in place, a recent surge in demand for 13-inch televisions having spurred a 400% increase in Japanese imports within a few months' period. According to the Commission, that increase in imports confirmed the supply flexibility available to Japanese companies.

Third, the Commission expressed a concern over a recent softening in demand for Japanese picture tubes, the most expensive component of a television receiver, in other overseas markets. Excess Japanese tube production capacity and lower U.S. duty rates on complete sets, as compared to tubes, were seen as incentives for the production of more sets for the United States market. Further, the possibility of major import restraints in other countries on tubes or sets would, in the absence of an antidumping order, encourage increased imports into the U.S.

Based on the above considerations, the Commission found that the U.S. television industry would be threatened with material injury if T.D. 71-76 were modified or revoked.

The Decision of the Court of International Trade

Reviewing the threatened injury determination on the administrative record, the Court of International Trade held that there

was "no substantial evidence to support the conclusion that the level of importations from Japan would be injurious if the antidumping order were to be revoked."

As an initial matter, the Court agreed with the premise utilized by the Commission that it must be presumed that future imports from Japan would be made at less than fair value. Further, the Court held that substantial evidence supported the Commission's finding that the U.S. industry was still in a delicate state of health.

The Commission's finding that material injury was threatened was improper, the Court concluded, because it was not based on "positive" evidence tending to show an intention by the Japanese to increase levels of importation, but rather on the asserted failure of the Japanese to introduce credible evidence to the contrary. According to the Court, an impermissible presumption was made "that the intention to increase imports (which was temporarily restrained by the existence of an antidumping duty order) remained undiminished." In the Court's view, the Commission, in attempting to honor the basic protective intent of the antidumping law, had erroneously premised its review on the validity of the existing order, thereby presuming injury would recur and improperly placing the burden on the Japanese companies to prove otherwise.

The Court reasoned that the "unavoidable inference" from the "changed circumstances" which triggered a review is that the threat of material injury had dissipated. Moreover, according to the Court, international agreements mandate this approach.[8]

The Court then specifically examined the evidentiary support for the Commission's finding on the Japanese intent to increase imports upon revocation of the antidumping order. An intent to increase, per the Court, could not be derived from a presumption that the antidumping order was restraining such intent, or from the failure of the Japanese to offer evidence of lack of intent, or solely from a disbelief in the credibility of the "evidence" (e.g., assurances of counsel) offered by the Japanese.

Turning to the record, the Court discounted reliance on evidence of Japanese production capability to support the conclusion that imports would increase following removal of the order. The Commission had not relied on that basis alone, according to the Court, nor had the Commission adequately confronted the irrationalilty of such behavior, in that increased imports would injure Japanese-owned subsidiaries in the U.S.

The Court then turned to the Commission's scenarios on threatened harm, which rested on a combination of capacity and other economic factors. The first scenario was dismissed because it was

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[8] On this point, the Court noted that Article 9(a) of the Agreement of Implementation of Article VI of the General Agreement on Tariffs and Trade provides that "an anti-dumping duty shall remain in force only as long as, and to the extent necessary to counteract dumping which is causing injury," the term "injury" being defined in Article 3, No. 1, as "material injury, *threat of material injury* to a domestic industry or material retardation of the establishment of such an industry." (Emphasis added.) As "threatened injury" is the question here, we find no guidance from the above-quoted provision.

no more than a truism that prices would be suppressed *if* import levels were to increase, an assumption the Court had just decided could not be made.

The second scenario was rejected because the Court found it inconsistent with the Commission's previous inclusion of the domestic Japanese subsidiaries in the U.S. market, which according to the Court, was a finding of "no coordination" between Japanese producers in Japan and their U.S. subsidiaries, whereas the second scenario was predicated on such coordination.[9]

The third scenario, relating to the projected surplus of Japanese picture tubes and probable use in sets to increase exportations to the attractive U.S. market, was found by the Court to be based not on verifiable factural predicates, but on "a chain of predictions set on an insubstantial base and * * * entirely conjectural."

Thus, the Court reversed the Commission's determination of threatened injury if T.D. 71–76 were revoked because the subsidiary findings of fact necessary to support the three injury scenarios were not supported by substantial evidence, and the scenarios did not flow rationally from the findings which were properly supported.

In this appeal, Zenith and the United States urge the correctness of the Commission's analysis and further urge that, in any event, the Court should have remanded for redetermination by the Commission under the standard adopted by the Court, rather than reversing. Matsushita advances the Court's position in all respects.

OPINION

A threshold question posed by the parties is whether, in reviewing determinations of injury or likelihood of injury in antidumping cases, we review the Court's decision to determine if it is based on a "fair assessment of the record," as Matsushita contends, or whether we directly review the determination of the *Commission*, as appellants assert.

There is no question but that under our jurisdictional statute it is the Court's decision that is before us. 28 U.S.C. § 1295(a)(5). However, resolution of whether the Court correctly held that the Commission's decision was not supported by substantial evidence requires consideration of the evidence presented to and the analysis by the Commission. Thus, to determine whether the Court correctly applied the statutory standard of 19 U.S.C. § 1516a(b)(1)(B),[10] we

[9] The Court had originally rejected this scenario on the basis that an increase in market share by the Japanese-owned subsidiaries in the U.S. would *benefit* U.S. industry of which they were part. On motion for rehearing by the appellant, the Court modified its reasoning to that stated above.

[10] 19 U.S.C. § 1516a(b)(1)(B) provides:

The court shall hold unlawful any determination, finding, or conclusion found—

* * * * * * *

(B) in an action brought under paragraph (2) of subsection (a) of this section, to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.

The Court is required by 28 U.S.C. § 2640(b) to apply that standard.

must review the Commission's decision. *Atlantic Sugar, Ltd.* v. *United States,* 744 F.2d 1556, 1559 n.10 (Fed. Cir. 1984); *Armstrong Bros. Tool Co.* v. *United States,* 626 F.2d 168, 169–70 (CCPA 1980). Only if we agree with the lower court's conclusion on this initial question would we reach the question whether the court properly disposed of the case by reversal, rather than remand.[11]

Applicable Standard in a Review Investigation

Matsushita argues that once the Commission accepted that circumstances had changed so drastically from those at the time of the 1971 injury determination to warrant review, the Commission must conduct a review investigation in the same "neutral" manner as an original investigation. Thus, in Matsushita's view, no burden of proof may be imposed on importers to establish that pricing and importing trends would *not* change or, if they did change, that they would *not* injure the domestic industry.

As an initial matter, we reject the view that a decision to undertake a review creates an inference that the outstanding order is no longer necessary. A decision to undertake review is a threshold decision which merely sets the review proceedings in motion and has no bearing on the merits. The evidence submitted in support thereof may or may not be persuasive on the issue of revocation.

Further, we do not agree that a review investigation begins on a clean slate just as though it were an original investigation to determine whether an antidumping order should be put into effect. The applicable regulation, 19 C.F.R. § 207.45(a), correctly provides that in a review investigation the Commission must be persuaded that an existing order could be *modified* or *revoked* without material injury to the U.S. industry.[12]

Finally, we do not discern that the Commission imposed a "burden of proof" on the Japanese importers to prove no injury was likely to occur. The Commission's decision does not depend on the "weight" of the evidence, but rather on the expert judgment of the Commission based on the evidence of record.[13] On review, the question is whether there was evidence which could reasonably lead to the Commission's conclusion, that is, does the administrative record contain substantial evidence to support it and was it a rational decision?

More specifically, the question here is whether the evidence and reasonable inferences from the record support the finding that the Japanese importers were likly to increase imports upon revocation of the antidumping order.

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[11] For discussion of an analogous situation concerning appeal from a district court where the trial had been before a master, see *Milliken Research Corp. v. Dan River, Inc.,* 739 F.2d 587, 592–93, 222 USPQ 571, 575–76 (Fed. Cir. 1984).

[12] We note that the regulations provide that if the vote of the Commission is evenly divided, the outstanding order remains unaffected. 19 C.F.R. § 207.45(a).

[13] Matsushita does not assert that the Commission's investigation was inadequate.

Substantial Evidence

As the Supreme Court stated in *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 229 (1938) and reaffirmed in *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 477 (1951): "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo* v. *Federal Maritime Comm'n,* 383 U.S. 607, 619–20 (1966); *Armstrong Bros.,* 626 F.2d at 170 n.3.

With the above principles in mind, we turn to the issue of whether substantial evidence supports the Commission's determination.

Matsushita's primary argument is that the Commission determination was not based on "a verifiable factual basis," but on mere "speculation." As stated in its brief:

> [*A*]*t no point* did the Commission find (or show evidence to support a finding) that as a consequence of revocation of the antidumping duty order: Japanese-owned firms *would* supplement their U.S. production with imports from Japan; or that they *would* lower their prices; or that the domestic industry *would be injured* if any of the import or pricing trends, which it hypothesized might occur, in fact occurred. Rather, the Commission's determination consisted of projecting three *hypothetical* sequences of events and concluding that, *if* these scenarios became reality, the domestic industry *could* be threatened with material injury. [Emphasis in original.]

Matsushita appears to ignore the inherently predictive nature of a review investigation. In no case will the Commission ever be able to rely on concrete evidence establishing that, in the future, certain events *will* occur upon revocation of an antidumping order. Rather, the Commission must assess, based on currently available evidence and on logical assumptions and extrapolations flowing from that evidence, the likely effect of revocation of the antidumping order on the behavior of the importers.

With respect to the "direct" evidence on intent, the record fully supports the Commission's disregard of "testimony" by counsel for the importers. Counsel maintained that revocation of the order would not result in lower prices or increased exports to the United States. However, after this testimony was heard by the Commission, and after the Commission was originally scheduled to vote in this investigation, imports of 13-inch sets from Japan increased 400 percent in one quarter, effectively negating counsel's assurances that imports would not increase and counsel's arguments that the decreased volume of imported Japanese television sets was an "irreversible trend" unrelated to the dumping finding. Further, coun-

sel acknowledged that T.D. 71-76 had had an effect on the volume and pricing decisions of the importers.

Since the importers chose not to provide any direct evidence on their intent, the Commission had no choice but to rely on circumstantial evidence from which to infer likely intent, namely, production capacity, domestic and foreign demand, and incentives or motivations to increase imports. Such factors are always relevant and, indeed, may be more reliable than self-serving declarations.

Here, the Commission found that any of three possible scenarios would harm or threaten harm to the U.S. industry. While we conclude that each scenario has sufficient evidentiary support, we limit our discussion to the third situation, which is sufficient to sustain the determination, and which the government brief treats in detail.

The third scenario relates to an expected excess of television tubes in Japan which the Commission predicted would likely be utilized in additional television sets for the expanding U.S. market. The government brief sets out the following evidentiary base for this scenario:

> Mr. Moss, an executive of Corning Glass Works (Corning), brought extensive, detailed knowledge on this issue to the Commission. Taiwan and Korea were in the process of constructing their own facilities for the production of color tubes. *E.g.,* app. 1529, 1591-92. The total planned capacity for these manufacturing facilities was 6.5 million tubes, which represented over a third of Japan's color tube capacity at that time. *E.g.,* app. at 1591. [Ed. note—appears slightly less than one third.] Korea and Taiwan would be filling the needs of their domestic markets and competing "nose-to-nose" with Japan for color tube sales in the export markets. App. at 1575. Mr. Moss testified, on the basis of his research which included meetings with Japanese tube manufacturers, that the Japanese color television tube manufacturers would face serious capacity utilization problems in the immediate future, "perhaps within a year." [Sic, "perhaps even next year."] App. at 1591. Reaching a certain economy of scale is crucial for tube producers because of the immense capital investment and other fixed costs required for tube production. *E.g.,* App. at 1526, 1530-31, 1574-75. Furthermore, because color television tube production equipment is highly specialized, and because of the great expense of retooling for any other product, a color tube producer will attempt to fill unused capacity before retooling to produce other products. App. at 1583-84. Thus, the Japanese tube producers would be under pressure to seek other markets to fill the unused capacity.
>
> In addition to the imminent contraction of demand in the Far East, the record showed that the European Economic Community was preparing to impose import restraints on Japanese color television sets and tubes. *E.g.,* App. at 1529-30, 1575-80, 2045-46; conf. app. at 3001. At the time of the investigation, the European Economic Community was Japan's largest direct

export customer for color tubes, as well as a major market for Japanese color receivers. By the time of the Commission vote, the EEC had already reached a consensus to monitor Japanese imports of televisions and tubes for the purpose of enabling import restraint measures. App. at 2045–46. Several member countries of the EEC had quotas on imported Japanese television sets already in place. Conf. app. at 3001–02. In addition, France had already been authorized by the EEC to limit imports of Japanese color sets entering from third-party countries. *Id.* Serious discussions on import restraints on tubes were already in progress. App. at 1577; conf. app. at 3001–02. Mr. Moss testified that "early next year Japanese exports to Europe will be limited by an agreement similar to an Orderly Marketing Agreement and the Japanese will definitely lose business in the [color television] tube market in Europe." App. at 1530. Corning France was making "hard and fast [current] business decisions involving tremendous amounts of capital based on a very firm conviction that in 1981 Japanese imports to Europe will be cut back very substantially." App. at 1579–1580. Moreover, this did not represent solely the opinion of Corning. Mr. Moss testified:

> These are not just my opinions. They are also the opinions of professional Japanese businessmen involved directly in the tube industry with whom I talked.
>
> The tube manufacturers are pretty concerned about their future. I have even been told that the *Japanese manufacturers expect to be severely limited in Europe, they will have to find an outlet for those tubes, and that outlet would be the United States.*

App. at 1595 (emphasis added).

No evidence on the record contradicted Mr. Moss' testimony on this point. Counsel for the Japanese producers argued that expanding markets in the third world (particularly Saudi Arabia and the Peoples' Republic of China) would compensate for contracting markets in the Far East and Europe. App. at 1648–52, 1713. However, no data as specific and authoritative as Mr. Moss' testimony were submitted in support thereof. In addition, Mr. Sartin of Corning Glass Works indicated that a study conducted by Corning on potential demand for color television receivers in the People's Republic of China indicated that there will be "no appreciable demand" in the PRC for color televisions in the near future. App. at 1670. There were also suggestions that tubes for video games and personal computers would fill some of the capacity lost by reduced sales in Europe, Taiwan and Korea. However, Mr. Moss testified that the projected growth in those markets would not "even come close" to filling the gap left by sales lost to Taiwan and Korea. App. 1588–90, 1592–94.

The Commission's reliance on Mr. Moss' testimony, in light of his considerable expertise in the area and the lack of any evidence which seriously undermined it, was eminently reasonable. Moreover, the Commission's conclusion that the United

> States was a likely target for diversion of the unused capacity was equally reasonable. At the same time that Japan was faced with impending import restraints in Europe and substantial contraction of its tube market in Taiwan and Korea, demand in the United States was growing, thereby making the United States a likely target for diversion of unused Japanese capacity. Exports represent a substantial portion of Japanese production of sets and tubes. Conf. app. at 3001[-02]. Although Japan's exports of televisions had declined in recent years as Japanese producers built facilities here, the record showed that Japan still exported more color television sets to the United States than to any other single country. Conf. app. at 3002[-03]. The United States has traditionally been one of Japan's major export markets for televisions, as well as one of the largest and most open markets in the world. The surge of 13-inch imports in the first quarter of 1981 provided concrete evidence that Japan had retained its long-held interest in this lucrative market. [Footnotes deleted; bracketed material represents corrections.]

We have reviewed the record references and find them to provide solid support for the above statements.

Matsushita counters the above excerpts from the record by pointing to other factors, specifically: that trade restraints were not actually imposed in Europe, Asia, or Latin America at the time of the Commission's determination; that Mr. Moss testified that he did not believe there was idle tube capacity in Japan at that time; that the Taiwan and Korean capacity was not in place; that there was growing demand for tubes in home computers and video games; that not all Japanese television set producers also produce tubes; and that there were large back orders for tubes in Japan. Further, Matsushita argues that it would not be rational for Japanese companies to dump since they would be injuring their U.S. subsidiaries.

That Matsushita can point to evidence of record which detracts from the evidence which supports the Commission's decision and can hypothesize a reasonable basis for a contrary determination is neither surprising nor persuasive. It is not the function of a court to decide that, were it the Commission, it would have made the same decision on the basis of the evidence. Our role is limited to deciding whether the Commission's decision is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." In this case, no basis has been shown for holding the Commission's determination unlawful under that limited standard of review.[14]

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[14] The additional views of Judge Nichols have not been incorporated into the majority opinion only because they read so well as separately stated.

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Conclusion

Since the Commission used an appropriate standard for conducting a review investigation and its determination under that standard is supported by substantial evidence, the decision of the Court of International Trade is *reversed*.

Reversed

APPENDIX

Matsushita Electric Industrial Co., Ltd., Matsushita Electric Corp. of America, Panasonic Hawaii, Inc., and Panasonic Sales Co., a Division of Matsushita Electric of Puerto Rico, Inc., Victor Co. of Japan, Ltd., and U.S. JVC Corp.

Sanyo Electric Co., Ltd., Sanyo Electric Inc., and Sanyo Manufacturing Corp.

Hitachi, Ltd. Hitachi Sales Corp. of America, and Hitachi Sales Corp. of Hawaii

Toshiba Corp., Toshiba America, Inc., and Toshiba Hawaii, Inc.

Mitsubishi Electric Corp.

Sharp Electronics Corp.

General Corp. of Japan

(Appeal Nos. 84-693 and 84-694)

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL., APPELLEES, *v.* THE UNITED STATES, ET AL., APPELLANTS

NICHOLS, *Senior Circuit Judge*, submits the following additional views:

The court's opinion performs very ably the appellate review which it is our duty to provide, and I join in it cheerfully. It may seem superfluous for me to write more, but I ask indulgence.

The role of the CIT in reviewing ITC determinations is relatively novel, the role of the former CCPA in performing corresponding appellate review was therefore novel also, and since this court is also new, there is a triple newness that would be unnerving to the tradition-bound. 19 U.S.C. § 1516a, under which the CIT conducted its review, was added only by Pub. L. No. 96-39, 93 Stat. 300, Act of July 26, 1979. The court is required to look for support of substantial evidence if it is to hold the ITC action legal, but the record apparently consists of just about every piece of paper in the ITC file. Section 1516-a(b) (1) and (2).

Following its historic practice, the ITC conducted its investigation more like a congressional committee than a court, and of course it was exercising delegated legislative powers. Looking over the record for support of the conclusions by "substantial evidence" is something like examining the files and hearing transcripts of a congressional committee to determine whether it had the support

of substantial evidence when it recommended passage of a bill. We do it here because the statute says we must, but we should not labor under the delusion it is always going to be easy. This time it is.

Like a congressional committee, the ITC allowed counsel for interested parties to be sworn and to make statements for the record as to what their clients wished the ITC to believe. These witnesses, American lawyers for Japanese companies having headquarters in Japan, hardly made any pretense of personal knowledge of the matters they spoke of, or even of possessing hearsay evidence such as might persuade a fact finder operating under a strict "substantial evidence" standard of record making and judical review. The ITC lamented it did not have much, if any, information as to the impact of the existing anti-dumping order on the policies of the Japanese producers, nor was it given the means of predicting what they would do if the order were lifted. Certainly they could have done anything at all without the breach of any pledged word or falsification of any sworn factual evidence.

The CIT judge said this lament reflected an impermissible throwing of the burden of proof on the proponents of lifting the order. I do not agree. There is a subtle but recognizable difference between the burden of proof and the burden of going forward. This investigation was conducted at all because these attorneys had requested on behalf of their clients that it should be. If they did not intend to waste ITC resources, it would be reasonable to think they would be in possession of information which, if believed and not controverted, would constitute a prima facie case. The burden on a complaint of racial discrimination under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.* (1964) to come forward with a prima facie case, comes to mind as an apt analogy. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

The failure to come forward with any real evidence suggests to the ordinary untutored mind, as it did to the sophisticated ITC Commissioners, that there was nothing to come forward with. It is not a question of not coming forward with evidence in the possession of someone else. The Japanese exporters of televisions were the ones who knew, and the only ones who knew, what the real impact of the prior order had been and was then being, upon their trade policies. They were the only ones who knew what they would do if their counsel were successful in getting the prior order lifted. To my mind, the failure to produce anything concerning these matters would have been an implicit admission justifying refusal to lift the order had there been no more.

But of course there was more. This court pays just tribute to the uncontradicted testimony of Mr. Moss. It is even more impressive in the unedited transcript than in the government summary. His company, Corning Glass, has a direct interest in the commerce under investigation since it is a leading producer of television

tubes. He had recently traveled on its behalf in the Orient. There may not be a word of truth in any of his testimony, but we are required to suppose otherwise, since it was given in person and under oath and subject to cross-examination, since his knowledge of the subject was obviously unsurpassed, and since no opposing testimony was introduced, as it easily could have been if Mr. Moss' testimony were false or if his opinions were erroneous. The Moss testimony is just the kind a court must look for when it is required to review a determination under the "substantial evidence" standard. One who seeks to overturn a quasi-legislative determination, reviewed under that standard, without such testimony in support of his own position is undertaking a heavy load indeed.

The Japanese exporters evidently wanted to get the order lifted "on the cheap," without really divulging any relevant information in return. I do not think Congress ever intended to give them such a power. Had they wanted the lifting badly enough to be willing to come and testify in person, or by deposition, or even by affidavit, we might have had a different case.

(Appeal No. 84-971)

AMOCO OIL COMPANY, ETC., APPELLANT, *v.* THE UNITED STATES, APPELLEE

(Decided: December 13, 1984)

Douglas W. Johnson, of Chicago, Illinois, argued for appellant.

Barbara M. Epstein, Department of Justice, of New York, New York, argued for appellee. With her on the brief were *Richard K. Willard*, Acting Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge International Trade Field Office.

Joan P. Freed, *Jeffrey I. Gordon* and *Mark W. Ryan*, Mayer, Brown and Platt, of Washington, D.C., were on the brief for Amicus Curiae, Dome Petroleum Corp.

Appealed from: U.S. Court of International Trade.

Judge FORD.

Before KASHIWA, *Circuit Judge*, SKELTON, *Senior Curcuit Judge*, and NIES, *Circuit Judge*.

KASHIWA, *Circuit Judge*.

This is an appeal from a decision of the Court of International Trade holding that the imported merchandise "center-cut" natural gas liquids (NGLs), was correctly classified under the Tariff Schedules of the United States (TSUS), item 430.00, which provides for "mixtures of two or more organic compounds" subject to an assessed duty rate of 5 percent ad valorem. We affirm the trial court.

BACKGROUND

The parties stipulated to the following facts. The imported merchandise, which contains more than 50 percent by weight of propane, is a mixture of compounds consisting of "center-cut" natural

gas liquids and propane, exported from Canada to the United States between February 17 and March 14, 1977. In the shipments at issue, extra propane was injected into the NGL mixture raising the propane level in the merchandise to more than 50 percent by weight. Prior to this injection, the mixture did not contain more than 50 percent by weight of any one hydrocarbon compound.

Upon importation into the United States, the NGLs were classified under TSUS, item 430.00, as "mixtures of two or more organic compounds" and were assessed with duty at the rate of 5 percent ad valorem. The appellant, Amoco, contends the subject merchandise is properly classifiable under TSUS, items 475.70 and 475.15, or, alternatively, controlled by TSUS, General Headnote 7.

The pertinent statutory provisions provide: Tariff Schedules of the United States, 19 USC Section 1202:

Schedule 4, Part 2:		
Item 430.00	Mixtures of two or more organic compounds.	5% ad valorem but not less than the highest rate applicable to any component compound.
Schedule 4, Part 10:		
Item 475.15	Natural gas, methane, ethane, propane, butane, and mixtures thereof	Free.
Schedule 4, Part 10:		
	Mixtures of hydrocarbons not specially provided for, derived wholly from petroleum, shale oil, natural gas, or combinations thereof, which contain by weight not over 50 percent of any single hydrocarbon compound:	
* * *	* * *	*
Item 475.70	In other than liquid form..........	Free.

General Headnote 7, TSUS:

7. Commingling of articles: (a) Whenever articles subject to different rates of duty are so packed together or mingled that the quantity or value of each class of articles cannot be readily ascertained by customs officers (without physical segregation of the shipment or the contents of any entire package thereof), by one or more of the following means—

* * * * * * *

the commingled articles shall be subject to the highest rate of duty applicable to any part thereof unless the consignee or his agent segregates the articles pursuant to subdivision (b) hereof.

* * * * * * *

(e) The provisions of this headnote shall apply only in cases where the schedules do not expressly provide a particular tariff treatment for commingled articles.

The trial court found the subject merchandise was not properly classifiable under TSUS, items 475.15 and 475.70, and that TSUS, General Headnote 7, did not apply. The trial court instead found that the merchandise was properly classified under TSUS, item 430.00, as a "mixture of two or more organic compounds" with duty assessed at the rate of 5 percent ad valorem. In reaching this conclusion the trial court determined that the imported merchandise constituted a single tariff entity even though the merchandise was composed of two duty-free parts.

I

Amoco argues for duty-free entry of its merchandise on two grounds. First, Amoco contends that since its merchandise consists of only two components, "center-cut" NGLs and propane, each of which, if imported separately would be admitted duty-free under TSUS, items 475.70 and 475.15, respectively, their mixture should also be admitted duty-free. Second, Amoco argues that its merchandise is "commingled" and therefore duty-free under TSUS General Headnote 7. We consider each argument in turn noting that Amoco has the burden of establishing that the classification of the Customs Service is incorrect. *Jarvis Clark Co.* v. *United States*, 739 F.2d 628 (Fed. Cir. 1984).

While Amoco argues for the duty-free entry of its merchandise on the basis that the components of its merchandise, "center-cut" NGLs and propane, are both, if imported separately, admitted duty-free, the government urges that duty-free entry of the subject merchandise is prohibited by the express language of TSUS, item 430.00.

A review of TSUS, item 475.70, indicates that "mixtures of hydrocarbons not specially provided for, derived wholly from, * * * natural gas or combinations thereof, which contain by weight not over 50 percent of any single hydrocarbon compound * * * are admitted duty-free. Put another way, TSUS, item 475.70, states that only mixtures which do not contain over 50 percent of any single hydrocarbon compound are classifiable thereunder. Since Amoco acknowledges that its imported merchandise contains over 50 percent by weight of the hydrocarbon compound propane, we are compelled, in view of the clear language of the statute, to conclude that TSUS, item 475.70, does not apply in this case. Amoco's attempt to show that TSUS, item 475.70 is applicable to its merchandise by

resort to the legislative history of the section is of no avail where, as here, the statute is unambiguous on its face. *Consumer Product Safety Commission* v. *GTE Sylvania Inc.*, 447 U.S. 102, 108 (1980); *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 184 (1978); *United States* v. *Corning Glass Works*, 586 F.2d 822 (CCPA 1978).[1]

Amoco further argues that since propane was mixed with the NGL stream for purposes of transportation in such a way that no new product was formed, the 50 percent limitation of TSUS, item 475.70, does not control. We cannot agree. Amoco has stipulated that "there is nothing inherent in the chemistry of propane or other ingredients of the NGL stream which required Amoco to add propane in amounts which resulted in raising the propane level in the merchandise to over 50 percent in weight." In short, the propane was not added to the NGL stream merely to facilitate the transportation of that stream. Although there are situations in which ingredients added to a product to facilitate transportation could be disregarded for tariff purposes, the factual circumstances of the instant case weigh against such an outcome.[2]

Amoco also argues that since its "center-cut " NGLs are derived directly from natural gas, both the NGLs and the additional injected propane are contemplated by TSUS, item 475.15. We do not agree. We note that while TSUS, item 475.15, states that "natural gas, methane, ethane, propane, butane and mixtures thereof" are admitted duty-free, Amoco has acknowledged that its merchandise is not natural gas, methane, ethane, propane or butane. Accordingly, since the imported merchandise is not any of the articles enumerated in TSUS, item 475.15, it cannot reasonably be considered a mixture of those articles. It is true, of course, that one of the hydrocarbon compounds contained in the merchandise, propane, is classifiable under TSUS, item 475.15, if imported separately. However, it does not follow that the entire "center-cut" mixture is classifiable thereunder. Indeed, the trial court observed and Amoco acknowledges that many of the other components of the merchandise, if imported separately, are not classifiable under this section. The trial court stated: "If imported individually, [the components of the NGL stream] neo pentane, iso pentane, n-pentane, and neo hexane are subject to classification under item 429.54, TSUS, at 5 percent ad valorem."

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[1] Dome Petroleum Corporation, *amicus curiae* in support of Amoco's position, theorizes that classification under TSUS, item 475.70, is not prohibited by the 50 percent limitation set forth in the statute because "the 50 percent product, propane, is duty-free" and the 50 percent rule applies only to dutiable ingredients. We, however, are unable to find support for such exception and are unpersuaded by the legislative history cited by Dome in the *Tariff Classification Study* of 1960 to adopt a view contrary to the clearly expressed limits of the statute.

[2] For example, in the *United States* v. *Aetna Explosives Company*, 256 U.S. 402 (1921), the imported merchandise was nitric acid transported in steel tank cars. Since nitric acid is known to corrode steel, sulphuric acid was added to the nitric acid to prevent corrosion of the tank cars and permit transport of the merchandise. The sulphuric acid added in these circumstances was held nondutiable. In distinct contrast to the sulphuric acid added in *Aetna, supra*, the extra propane injected into the imported merchandise at bar was not added merely to facilitate transportation of the NGL stream. Rather, the record shows that the extra propane added to the NGL stream had commercial value in and of itself. *See also Northam Warren Corp.* v. *United States*, 475 F.2d 647 (CCPA 1973).

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Finally, Amoco argues that, as an alternative to classification under TSUS, item 475.70 and 475.15, its merchandise should be admitted duty-free under TSUS, General Headnote 7 as commingled articles. Amoco here regards its imported mixture as comprising only two articles, NGLs and propane, both of which are admitted duty-free. Under the "highest rate rule" Amoco contends that its merchandise should be assessed at a zero rate of duty inasmuch as the highest rate applicable to "any one kind of merchandise," i.e., the propane or "center-cut" NGL streams, is zero.[3] We do not accept this reasoning. First, Amoco's argument is based on a mischaracterization of the subject merchandise into only two components. We, here, are in agreement with the trial court's observation that the subject merchandise as a whole is a mixture of propane and the components of NGL. Under the express statutory provision, NGL loses its status as a recognizable product when any ingredient exceeds 50%. At that point, it becomes merely a mixture of its chemical components. As we agree the merchandise is a mixture, it was properly classified under TSUS, item 430.00, and General Headnote 7 is inapplicable.[4] Moreover, even if we accepted Amoco's characterization of its merchandise as a mixture of only two duty-free components, the language of the headnote would still not apply. The first line of the headnote provides that the highest rate rule is applicable only where articles subject to different rates of duty are commingled. Since the "center-cut" NGL stream, prior to the injection of the extra propane, was subject to the same zero rate of duty as the propane imported separately, the terms of the headnote are not satisfied.

Finally, we note that case law supports the conclusion that where merchandise is determined to be a mixture, the commingling headnote does not apply. Amoco, in reviewing the court decisions upon which the Customs Service relied, *V. Alexander & Company, Inc.* v. *United States,* 276 F. Supp. 573 (Cust. Ct. 1967) and *United States General Appraisers,* T.D. 25,646, 8 Treas. Dec. 385 (1904), concluded that only when a "mixture" of two items forms a new, entirely distinct article is such mixture classified under a provision relating to the new item. We do not accept this interpretation as controlling. Rather, these cases support the notion that a mixture is dutiable under a mixture provision even if the components of the mixture would be duty-free if imported separately. Moreover, Amoco's reliance on *Archer-Daniels-Midland Co.* v. *United States,* C.D. 1618, 32 Cust. Ct. 305 is misplaced. In *Archer-Daniels-Midland* the merchandise in question was a mixture of sperm oil and whale oil. The importer claimed treatment for its

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[3] The highest rate rule refers to the effect of applying the commingling rule of General Headnote 7(a) to assess upon the entire commingled mixture the highest rate of duty applicable to any part.

[4] Where the merchandise is given particular treatment elsewhere in the schedule, subsection (e) to the General Headnote 7 provides that the headnote is not applicable. Since the merchandise here is a "mixture," TSUS, item 430.00, which provides for "mixtures of two or more organic compounds," is just such a particular tariff provision.

merchandise under the commingling rule, with duty assessed in accordance with the highest rate of duty applicable to any one part of the commodity rather than the duty assessed on the merchandise as a "mixture." The court rejected this contention, stating that the specific provision for combinations and mixtures of oil contained in the tariff statute precluded resort to the commingling section of the act. The court stated that "Congress was cognizant of and wished to guard against the invasion by section 508 [the predecessor to the commingling headnote] of provisions in the tariff act for mixtures of various kinds * * *." 32 Cust. Ct. at 310. By the court's reasoning, if resort were had to section 508, the statutorily fixed duty rates for mixtures would be rendered null and void. *E.C. Lineiro* v. *United States,* 37 CCPA 10, C.A.D. 411 (1949), cited by the trial court, provides further support for our finding that the commingling headnote is inapplicable to the case at bar. In *E.C. Lineiro,* the court did not consider dispositive the fact that each component part of the merchandise in question was *eo nomine* designated in the tariff statute. Rather, the court's characterization of the merchandise as a mixture prevailed over any specific provisions of the tariff act relative to its component parts.

In summary, Amoco has not shown that the Customs Service misclassified its merchandise. In particular, Amoco's merchandise was properly classified under TSUS, item 430.00, which provides for "mixtures of two or more organic compounds." Amoco, by the manner in which it chose to enter its merchandise, is precluded from duty-free treatment by the clear terms of the controlling statute. We affirm the judgment below.

Affirmed

(Appeal No. 84-1040)

SCHOTT OPTICAL GLASS, INC., APPELLANT, *v.* UNITED STATES, APPELLEE

(Decided: December 11, 1984)

Richard C. King, Fitch, King & Caffentzis, of New York, New York, argued for appellant.

John J. Mahon, Department of Justice, of New York, New York, argued for appellee. With him on the brief were *Richard K. Willard,* Acting Assistant Attorney General, *David M. Cohen,* Director and *Jospeh I. Liebman,* Attorney in Charge International Trade Field Office.

Carl W. Schwarz and *Wesley K. Caine,* Metzger, Shadayc & Schwarz, of Washington, D.C., was on the brief for Amicus Curiae.

Appealed from: Court of International Trade.
Judge MALETZ.
Before FRIEDMAN, BENNETT, and NEWMAN, *Circuit Judges.*
FRIEDMAN, *Circuit Judge.*

This is an appeal from the judgment of the United States Court of International Trade in *Schott Optical Glass, Inc.* v. *United States*, 587 F. Supp. 69, sustaining the Customs Service's classification of the appellant's imported glass. That court held that a prior decision upholding the identical classification of similar glass the appellant imported was *stare decisis,* and it refused to allow the appellant to introduce evidence designed to show that the prior decision was clearly erroneous. We reverse and remand to allow the appellant to produce that evidence.

I

The merchandise consists of seven types of filter glass used in optical instruments such as spectrometers, spectrophotometers and solar filter simulators. Two of the filters—one nearly colorless and the other colorless—transmit visible light while absorbing specific wavelengths in the ultraviolet or infrared spectrum. The remaining five types are dark glass which absorb most the visible light, transmitting either the ultraviolet or infrared light.

The Customs Service classified the importations as "other optical glass" under item 540.67 of the Tariff Schedules of the United States (TSUS). The appellant (Schott) contends that six of the seven should have been classified as "colored or special glass" under item 542.92 and the remaining type as "ordinary glass" under item 542.42.

There was an earlier case between the same parties in which the courts upheld the Customs Service's classification as "optical glass" of colored filter glass imported by the appellant. In *Schott Optical Glass, Inc.* v. *United States*, 468 F. Supp. 1318. (Cust. Ct.), aff'd 612 F.2d 1283 (CCPA 1979) (*Schott I*), the Customs Court, on the basis of prior decisions, ruled that glass classified as optical glass under item 540.67 TSUS is presumed to be (a) vey high quality, (b) used for optical instruments, and (c) capable of performing an optical function, 468 F. Supp. at 1322. It held that Schott failed to sustain its burden of proving that its glass did not come within the foregoing standards. The Court of Customs and Patent Appeals affirmed, holding that the common meaning of optical glass (which governed its tariff classification) does not include the additional requirement (which Schott urged it did) that the glass have a specifically controlled refractive index and dispersion. 612 F.2d at 1286.

During the trial of the present case, the Court of International Trade ruled that *Schott I* had determined the common meaning of "optical glass" for tariff purposes and that it was bound by that decision. The court excluded all evidence relating to the common meaning of the tariff term, which Schott wanted to introduce to show that the earlier decision in *Schott I* was clearly erroneous because it adopted an erroneous meaning for "optical glass."

The Court of International Trade concluded that under *stare decisis* the common meaning of optical glass as determined in *Schott*

I was controlling. 587 F. Supp. at 71. The court rejected Schott's claim that the former decision was clearly erroneous, stating that the Court of Customs and Patent Appeals had already rejected the arguments upon which that claim rests. The court held that the filters in this case met the three-part test for optical glass and that the Customs Service therefore had properly classified them in that category.

II

In *United States* v. *Stone & Downer Co.,* 274 U.S. 225 (1927), the Supreme Court held that in customs classification cases a determination of fact or law with respect to one importation is not *res judicata* as to another importation of the same merchandise by the same parties. The opportunity to relitigate applies to questions of construction of the classifying statute as well as to questions of fact as to the merchandise. 274 U.S. at 236. This narrow exception to the doctrine of *res judicata* applies only in customs classification cases and not in reappraisement cases. *See J.E. Bernard & Co.,* 324 F. Supp. 496 (Cust. Ct. 1971).

Under *Stone & Downer,* the doctrine of *res judicata*—which bars litigation by the same parties of the same issues previously adjudicated, *Commissioner* v. *Sunnen,* 333 U.S. 591, 597 (1948)—would not bar Schott from relitigating either the meaning of "optical glass" or the classification of its filters in this case as within that category. The Court of International Trade, however, held that such relitigation was barred by *stare decisis,* under which courts generally refuse to examine legal issues previously decided in another case. *United States* v. *Mercantil Distribuidora, S.A.,* 45 CCPA 20, 23–24 (1957). The Court of International Trade held that the meaning of "other optical glass" had been decided in *Schott I* and that that decision precluded it from considering Schott's attempt to relitigate the meaning of that term.

There is a well-recognized exception to *stare decisis,* however: A court will reexamine and overrule a prior decision that was clearly erroneous. *H. W. Robinson Airfreight Corp.* v. *United States,* 48 CCPA 148 (1961); *Adolphe Hurst & Co.* v. *United States,* 33 CCPA 96 (1946). In the present case, Schott sought to introduce evidence, much of which it says it did not introduce in the prior case, to show that the court's interpretation of "other optical glass" in *Schott I* was clearly erroneous.

In refusing to receive that evidence, the Court of International Trade did not rule that the evidence added nothing to what was before the court in *Schott I* and therefore could not show that that decision was clearly erroneous. Instead, it apparently applied the principle of *res judicata*—that the parties cannot relitigate an issue resolved in an earlier case—to the different issue whether *stare decisis* is inapplicable because the prior decision was clearly erroneous. Thus, after refusing to admit evidence relating to the defini-

tion of "optical glass," the court rejected Schott's arguments designed to show that the prior decision was clearly erroneous because "these same arguments were presented to the Court of Customs and Patent Appeals by this same plaintiff in *Schott I* and were rejected." 587 F. Supp. at 71. The issue, however, is not whether the arguments are the same but whether the new evidence would show that the rejection of those arguments in the prior case was clearly erroneous.

If the importer cannot introduce new evidence relating to the correctness of the prior decision, frequently it will be impossible for it ever to build the foundation for the legal argument that that decision was clearly erroneous. In the present case, for example, Schott sought to introduce additional expert testimony and excerpts from treatises dealing with the meaning of "optical glass" designed to show that the prior decision had misinterpreted that term. In a number of cases, including several that the Court of International Trade cited, the parties were permitted to relitigate the common meaning of tariff terms, with or without the introduction of new evidence. *See John C. Rogers & Co.* v. *United States,* 524 F.2d 1220 (CCPA 1975); *United States* v. *Dodge & Olcott, Inc.,* 47 CCPA 100 (1960); *United States* v. *Mercantil Distribuidora, S.A.,* 45 CCPA 20 (1957); *Adolphe Hurst & Co.* v. *United States,* 33 CCPA 96 (1946). The Court of International Trade has not given any convincing explanation why Schott should be denied the opportunity to introduce additional evidence that it believes will establish that *Schott I* was clearly erroneous.

Schott, in effect, made an extensive offer of proof of what the new evidence would show. We cannot say whether that evidence, when added to the evidence in the prior case and subjected to cross-examination when testimonial, would cause either the Court of International Trade or this court of appeals to conclude that the prior decision was clearly erroneous. Considering all the circumstances of this case, however, we conclude that Schott should have been allowed to offer the additional evidence it believed would undermine the prior decision.

In so ruling, we intimate no opinion on what effect, if any, that evidence would have in evaluating the correctness of *Schott I.* Nor do we suggest that the Court of International Trade necessarily must admit every item of evidence that Schott offers. The admissibility of each item must be determined by that court upon the basis of the usual criteria of relevance, probative force, authenticity, accuracy, etc.

Cumulative evidence may or may not be relevant on particular issues. If, for example, the record in the prior case contained only two or three dictionary or scientific treatise definitions of "optical glass," the existence of an additional large number of similar definitions, although cumulative to the material in the earlier case,

nevertheless by sheer volume might raise doubts about the court's earlier rejection of those definitions.

These questions of admissibility and weight are for the Court of International Trade to decide in the first instance. We hold only that that court erred in its blanket exclusion of all of Schott's evidence.

Conclusion

The decision of the Court of International Trade is reversed, and the case is remanded for further proceedings consistent with this opinion.

Reversed and Remanded

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United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
Morgan Ford
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo

Senior Judges

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 84-130)

STAR-KIST FOODS, INC., PLAINTIFF *v.* UNITED STATES, AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES, ET AL., INTERVENORS

Court No. 83-12-01711

(Dated: December 6, 1984)

Before FORD, *Judge.*

MEMORANDUM AND ORDER

FORD, *Judge:* This action, instituted under Section 516A(a)(2) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2), contests a final affirmative countervailing duty determination by the International Trade Administration of the United States Department of Commerce covering canned tuna from the Philippines. (48 Fed. Reg. 50,133, October 31, 1983).

Before the Court are motions related to the content of and accessibility to the administrative record in this case. Plaintiff has moved to supplement the administrative record and for a protective order to permit disclosure of certain documents contained therein. Defendants partially oppose both the above motions and have cross-moved for a protective order barring disclosure.

The administrative record presently consists of 293 documents (A.R. 1-293). Subsequent to the filing of the instant motions, the administrative record was amended to reflect the addition of ten documents sought in the motion to supplement.[1] Plaintiff's present motion to supplement involves five documents.[2] The motions pertaining to disclosure encompass thirty documents in all.[3]

Defendants oppose the motion to supplement, maintaining the five documents sought to be included are not properly part of the

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[1] A.R. 293, 284, 285, 286, 287, 292, 288, 289, 290, 291.

[2] Cable—U.S./Philippine Bilaterals—the investment climate—4/27/83; Cable—Treasury/Philippine Finance Ministry Consultations, May 3—5/10/83; Cable—Treasury/Philippine Finance Ministry—5/10/83; Cable—Treasury/Philippine Finance Ministry—5/10/83; Paper—title —"Questions on Philippine Export Subsidies"—5/17/83.

[3] A.R. 3, 9, 11, 14, 16, 23, 25, 43, 61, 62, 67, 76, 115, 116, 122, 284-293, and the five documents subject to the motion to supplement.

administrative record. Defendants cross-move for a protective over barring the release of all or certain portions of the following documents, contained in the administrative record, to which plaintiff seeks access: A.R. 14, 16, 23, 25, 61, 62, 67, 76, 115, and 284–291. Additionally, defendants cross-move to bar disclosure of a document not sought, A.R. 9, in its entirety. These cross-motions are based upon claims of privilege, i.e., state secrets and deliberative process, asserted by the heads of the agencies whose documents are involved. There are no objections to the disclosure of seven documents previously classified pursuant to Executive Order No. 12356 but since declassified in their entirety (A.R. 3, 11, 43, 116, 122, 292, 293). These documents have been released as part of public record and are available to plaintiff.

Plaintiff claims the documents excluded from the administrative record contain information considered by the International Trade Administration in reaching its final countervailing duty determination. In moving for disclosure of the classified portions of documents in the administrative record, plaintiff contends defendants have not met their burden of justifying privileged status. Plaintiff also argues any claim of privilege has been waived through defendant's delay and that the protective order provides the necessary safeguards should the documents be disclosed.

Of initial concern to the Court is plaintiff's motion to supplement the administrative record. 19 U.S.C. § 1516a(b)(2)(A) provides the administrative record for the purposes of this action is to consist of:

> (i) a copy of all information presented to or obtained by the Secretary, the administering authority, or the Commission during the course of the administrative proceeding, including all governmental memoranda pertaining to the case and the record of ex parte meetings required to be kept by section 777(a)(3) [19 U.S.C. § 1677f(a)(3)]; and
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> (ii) a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.

These provisions were defined in more practical terms in *Beker Industries Corp.* v. *United States,* 7 CIT ——, Slip Op. 84-62, where the Court found the scope of the record for purposes of judicial review to be the "information which was before the relevant decision-maker at the time the decision was rendered."

Plaintiff became aware of the five subject documents by virtue of several Freedom of Information Act inquiries. The documents consist of four cables between United States and Philippine Government agencies and a paper on Philippine Export Subsidies. Defendants assert the documents involved were never presented to or obtained by the Commerce Department during the course of the administrative investigation. In support of this assertion, defendants have filed the Declaration of Robert F. Seely, Senior Counsel for Policy in the Office of Assistant General Counsel for Import Ad-

ministration. While the descriptions of the documents at issue connote an arguable relevance to the administrative proceeding below, the sworn, uncontradicted declaration of the agency official responsible for such documentation must be seen as determinative. Plaintiff's motion to supplement the administrative record must, therefore, be denied.

Turning to the motion and cross-motions pertaining to disclosure of the "classified" portions of the administrative record, the Court first looks to the applicable statutory provisions covering such matters. 28 U.S.C. § 2641(b) provides:

(b) The Court of International Trade may order that trade secrets and commercial or financial information which is privileged and confidential, or any information provided to the United States by any foreign government or foreign person, may be disclosed to a party, its counsel, or any other person under such terms and conditions as the court may order.

19 U.S.C. § 1516a(b)(2)(B) further provides:

> (B) Confidential or privileged material. The confidential or privileged status accorded to any documents, comments, or information shall be preserved in any action under this section. Notwithstanding the preceding sentence, the court may examine, in camera, the confidential or privileged material, and may disclose such material under such terms and conditions as it may order.

Under the foregoing statutes, this Court is explicitly empowered and has been granted discretion to order the disclosure of any information provided to the United States in connection with the underlying countervailing duty determination. *Ceramica Regiomontana, S.A.* v. *United States,* 4 CIT 168, Slip Op. 82-90 (1982).

Defendants have asserted claims of privilege with respect to documents subject to disclosure. The state secrets privilege is claimed against eighteen of the documents at issue, with the additional claim of deliberative process privilege being made as to portions of seven of the documents added in the amended administrative record. Defendants have filed both confidential and public versions of the administrative record with the Court, the "classified" portions of the documents having have deleted from the public version.

Of the eighteen documents [4] to which privilege is asserted, sixteen were generated by three United States Government agencies: the Department of Commerce, the Department of State, and the United States Trade Representative (U.S.T.R.). These documents consist of cables and internal memoranda which, defendants maintain, are essential to the conduct of United States foreign relations.[5] Each has been classified "confidential", in whole or in part,

[4] A.R. 288, 9, 14, 16, 23, 25, 61, 62, 67, 76, 115, 284-287, 289-291.

[5] In support for the assertion of privilege, defendants submit the declarations of Commerce Secretary Malcolm Baldrige, Acting Secretary of State Kenneth W. Dam, and United States Trade Representative William E. Brock.

in accordance with Executive Order No. 12356. Of the remaining documents, A.R. 9 is an internal report of the World Bank covering a proposed Second Structural Adjustment Loan to the Government of the Philippines. A.R. 288 is a negotiating document transmitted to officials of the U.S.T.R. by the Philippine Government. Both the World Bank and the Philippine Government have specifically requested that their respective documents retain their classified status and remain confidential.[6]

Defendants urge the privilege of state secrets be considered absolute and cite well-established case law in support of this position. *United States* v. *Reynolds,* 345 U.S. 1 (1953). Should the Court accept this contention, the proper assertion of privilege, pursuant to Executive Order No. 12356, would dictate total acquiescence to defendants motion. The plain language of 28 U.S.C. § 2641(b) (*supra*), however, precludes such an interpretation, as the state secrets privilege may not be regarded as absolute in the Court of International Trade. *Ceramica Regiomontana,* (supra). The proper assertion of privilege is but one factor, albeit a strong factor, for the Court to consider in balancing the conflicting interests involved in disclosure of such documents.

Having examined the documents at issue *in camera,* I find the concern expressed by the affiants to be well-founded. While the Court will not ordinarily countenance broad, conclusory assertions by affidavit,[7] in this instance I am satisfied that release of the documents in question would pose a "reasonable danger" to national security. While respecting plaintiff's need for all pertinent material in order to properly present its challenge to the determination below, in weighing the arguments for and against disclosure, I conclude the balance of needs favors non-disclosure. In so finding, the Court is fully cognizant that disclosure of material against which a claim of state secrets is asserted may have a significance "wholly independent of the contents of the documents." *Ceramica Regiomontana,* (supra), citing *Carlisle Tire & Rubber Co.* v. *United States Customs Service,* 1 ITRD 1891, 1897 (D.D.C. 1979). In the present situation, the Court realizes that disclosure of these classified documents, even under the terms of a protective order, could have serious ramifications and consequently affect the conduct of United States foreign relations. Morever, in reviewing the materials involved, I find the classified portions of the documents to be of only marginal relevance to the issues presented in the case at bar. For these reasons, defendants' assertions of state secrets privilege are sustained

Of final concern to the Court is defendant's claim of deliberative process privilege covering portions of seven of the documents added in the amended administrative record (A.R. 284–287, 289–291). Defendants contend the reference documents consist of internal

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[6] Declaration of U.S.T.R. Brock, *supra.*

[7] See e.g., *Republic Steel Corp.* v. *United States,* 3 CIT 117, 538 F. Supp 422 (1982).

memoranda and draft negotiating documents containing legal opinions and policy viewpoints concerning highly sensitive trade policy initiatives. Defendants assert these documents contain internal deliberations essential to the informed decisionmaking processes. The declaration of William E. Brock, U.S.T.R., is submitted in support of this claim.

Documents of this nature, compiled solely for internal use and which comprise part of the process and ideas upon which agency determinations are based, are subject to a protective order against disclosure on the ground of privilege. *SCM Corp.* v. *United States*, 82 Cust. Ct. 351, C.R.D. 79–11, 473 F.Supp. 791 (1979); *Sprague Electric Co.* v. *United States*, 81 Cust. Ct. 168, C.R.D. 78–18, 462 F.Supp. 966 (1978). Once the proponent of privilege has complied with the established criteria for asserting privilege, the opposing party must demonstrate clearly and persuasively that the need for disclosure outweighs the harm that could result from disclosure. *Melamine Chemicals, Inc* v. *United States*, 1 CIT 65, Slip op. 80–14 (1980).

After inspecting those portions of the documents relevant to this motion, the Court agrees with defendants characterizations of the involved materials. It is obvious these documents were intended as internal memoranda. Similarly, impairment of the deliberative process which could result from disclosure of this type of documentation is readily discerned. Furthermore, having examined the subject documents *in camera*, the Court believes their disclosure would be of limited value to plaintiff, as the information contained therein is of little relevance to plaintiff's challenge of the administrative determination.

For the foregoing reasons, the Court adopts fully the terms of defendants cross-motion for protective order barring disclosure. As indicated *supra*, plaintiff's motion to supplement the administrative record is denied. Judgment will be entered accordingly.

(Slip Op. 84–131)

Ceramica Regiomontana, S.A., et al., plaintiffs, and Internacional de Ceramica, plaintiff-intervenor, *v.* United States, et al., defendants, and Tile Council of America, defendant-intervenor

(Court No. 84–3–00387)

Before Re, *Chief Judge.*

Memorandum Opinion and Order

Defendant-intervenor, Tile Council of America (TCA), moves for disclosure of confidential documents pursuant to a protective order. Plaintiffs, Ceramica Regiomontana, S.A., and Industrias Interconti-

nental, S.A., move for an extension of time in which to respond to TCA's motion.

Held: Since plaintiffs did not provide an adequate explanation for failure to respond to defendant's motion in a timely fashion, their motion for an extension of time is denied. TCA's motion for disclosure is granted in accordance with the protective order formulated by the court.

(Decided December 6, 1984)

Brownstein, Zeidman and Schomer (Irwin P. Alstschuler, Steven P. Kersner and *David R. Amerine),* for the plaintiffs.

Richard K. Willard, Acting Assistant Attorney General; *David M. Cohen,* Director Commercial Litigation Branch *(A. David Lafer),* for the defendants.

Wald, Harkrader & Ross (Noel Hemmendinger, Walter J. Spak and *Jeffrey W. Carr),* for plaintiff-intervenor, Internacional de Ceramica, S.A.

Howrey & Simon (David C. Murchinson, John F. Bruce, Kevin P. O'Rourke and *Doris E. Long),* for defendant-intervenor, Tile Council of America, Inc.

RE, *Chief Judge:* Plaintiffs, Ceramica Regiomontana, S.A., and Industrias Intercontinental, S.A., initiated this action to challenge the final affirmative determination of a section 751 administrative review by the Department of Commerce's International Trade Administration (ITA) of its original countervailing duty order. The review was conducted pursuant to section 751 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675 (1982), and pertained to ceramic tile imported from Mexico 49 Fed. Reg. 9,919 (1984). By Order of this Court, dated June 29, 1984, Internacional de Ceramica (Interceramica) and the Tile Council of America (TCA) were permitted to intervene in this action as plaintiff and defendant, respectively. *Ceramica Regiomontana, S.A.* v. *United States,* 7 CIT ——, Slip Op. 84-77 (June 29, 1984).

On September 13, 1984, TCA defendant-intervenor, moved for the disclosure of confidential documents contained in the administrative record pursuant to a protective order. *See* 19 U.S.C. § 1516A(b)(2)(B) (1982). With this motion, TCA submitted a proposed protective order. Defendant, United States, did not object to this motion. On September 24, 1984, Interceramica, plaintiff-intervenor, acceded to disclosure but filed its own suggested protective order. The original plaintiffs, however, did not respond to TCA's motion until October 26, 1984, when they filed a motion for an extension of time in which to respond. TCA opposes their motion for an extension of time.

Two questions are presented. First, whether the plaintiffs should be permitted to file an untimely response to TCA's motion; and second, since all parties consent to disclosure under a protective order, under what terms should the disclosure of the confidential material be permitted.

Rule 7(d) of the Rules of the Court of International Trade allows a party ten days in which to respond to a non-dispositive motion. Under Rule 6(b) of the Rules of this Court, a party may move for

an extension of time. When the time for a response has already expired, however, an extension can be granted only "when for good cause shown, the delay in filing was the result of excusable neglect or circumstances beyond the control of the party."

The plaintiffs' motion for an extension of time states only that the responsive papers were prepared by September 24, 1984, and that, despite counsel's instructions that they be filed, they were never filed. Counsel states that, on that date, he left the country on business, and that his joining a new law firm "possibly" resulted in the papers never being received. This explanation offered by plaintiff's counsel is insufficient to demonstrate either "excusable neglect or circumstances beyond the control of the party."

The granting or withholding of an extension of time is within the court's sound discretion. *See In re Buckingham Supermarkets, Inc.*, 534 F.2d 976, 977 (D.C. Cir. 1976); 2 J. Moore, MOORE'S FEDERAL PRACTICE § 6.08 (2d ed. 1976). When an extension is sought after the due date, counsel must offer a reasonable explanation of the occurrences which constitute "excusable neglect or circumstances beyond the control of the party."

In moving for an extension, plaintiffs have not shown "good cause" or explained the circumstances which justify the granting of the requested extension. Instead, they have made the conclusory assertion that "all reasonable steps were taken by plaintiffs' counsel to prepare the document for timely filing * * *." No explanation is given to indicate why the other two attorneys whose names appear on the motion could not have undertaken the proper filing of the papers. Simply stated, a motion which requests an extension to respond to a motion, after the time for response has expired, must set forth sufficiently cogent reasons to indicate "good cause." The attempted explanation in this case is neither sufficiently specific nor persuasive to comply with the requirement of Rule 6(b) that the moving party demonstrate that "the delay in filing was the result of excusable neglect or circumstances beyond the control of the party."

It should also be noted that Rule 7(b) of the Rules of this Court requires that counsel attempt, in good faith, to reach an agreement on discovery issues before resorting to the court. On June 29, 1984, defendant-intervenor, TCA, sent a copy of the proposed order to the plaintiffs' counsel. TCA sent a follow-up letter on July 30, 1984. The plaintiffs' counsel did not respond to either letter. This seemingly uncooperative attitude in the discovery process militates against the court's exercise of its discretionary power in granting an extension of time. For the foregoing reasons, plaintiffs, Ceramica Regiomontana, S.A. and Industries Intercontinental, S.A., motion for an extension is denied.

Since all parties have consented to disclosure under a protective order, the only remaining question pertains to the terms of the order. The orders proposed by defendant, TCA, and plaintiff-inter-

venor, Interceramica, are substantially similar. The court is fully aware of the fundamental importance of maintaining the confidentiality of the requested material.

Accordingly, it is hereby

ORDERED that the documents identified on the attached Exhibit 1 be made available to David C. Murchison, John F. Bruce, Kevin P. O'Rourke, and Doris E. Long, attorneys in the law firm of Howrey and Simon (hereinafter "Attorneys"), subject to the following terms and conditions:

1. The Attorneys will treat the information contained in the requested documents (hereinafter "confidential information") as confidential to the extent such confidential information is not otherwise available in the public portion of the administrative record;

2. Within ten days from the date of entry of this order, defendants will make available to the Attorneys, at the offices of the International Trade Administration of the Department of Commerce, for copying or examination a copy of each of the documents listed on Exhibit 1 in its entirety, marked "Confidential," subject to the following terms and conditions:

a. All information not otherwise available in the public portion of the administrative record shall be considered as confidential;

b. The Attorneys shall not dislcose the information to anyone (including any officer, shareholder, director, or employee of the defendant-intervenor in this matter) other than the Attorneys' *immediate* office personnel actively assisting in this litigation or in administrative proceedings resulting from an order of this Court, in this litigation, remanding this matter to the administrative agency.

c. The Attorneys shall cause all office personnel authorized to see the confidential information to sign a statement of acknowledgment that the information is confidential and that such information will not be disclosed to anyone other than authorized personnel at Howrey & Simon.

d. Should the Attorneys consider the services of an expert necessary to the presentation of their case in this litigation, and the expert's services require the use of confidential information, the Attorneys shall, prior to providing confidential information to an expert, notify counsel for defendants, plaintiffs, and plaintiff-intervenors of their desire to retain an expert and shall provide counsel for defendants, plaintiffs, and plaintiff-intervenors with: (1) the *curriculum vitae* of the proposed expert; (2) a description of the measures for safeguarding the confidential information proposed to be made available to the expert; (3) assurances that the expert will provide the parties and the court with a statement that the expert consents to be bound to the terms of this protective order. No later than ten days from the date of receipt of the above-described information, defendants, plaintiff, and plaintiff-intervenors shall either consent to the use of the expert proposed by the Attorneys or indicate their objections in writing. If the parties are unable to agree

upon an acceptable expert within ten days, the Attorneys may file an appropriate motion with the Court.

e. The Attorneys shall not make more than four (4) copies of any document that is deemed "Confidential" pursuant to this stipulation. There shall be maintained a record of each copy made, and for whom it is made.

f. Whenever any document subject to the protective order is not being used, it shall be stored in a locked vault, safe, or other suitable container, in a designated location at the offices of Howrey & Simon.

g. The Attorneys and their immediate office personnel (as described in 2(b)) shall neither disclose nor use any of the confidential information for purposes other than this litigation or in administrative proceedings resulting from an order of this Court, that remands this matter to the administrative agency.

h. Any document containing any of the confidential information, including briefs and memoranda, which is filed with the court shall be conspicuously marked as containing information that is not to be disclosed to the public, and arrangements shall be made with the Clerk of this Court to retain such documents under seal. The Clerk shall permit access only to the court, Court of International Trade personnel authorized by the court to have access, and counsel for the parties who have been granted access to the documents under this order. The party filing any document that contains confidential information shall also file at the same time another copy of such document from which all of the confidential information shall have been deleted.

i. Any briefs or memoranda containing confidential information shall be served in a wrapper conspicuously marked on the front "Confidential—to be opened only by (the names of the attorneys handling the case)" and shall be accompanied by a separate copy from which the confidential information shall have been deleted.

j. If it becomes necessary to introduce in evidence any documents containing the confidential information, counsel for the respective parties shall propose whatever mechanism may be available and appropriate to limit publication of the documents to an extent no wider than is necessary for purposes of this litigation.

k. Upon conclusion of this litigation, or of administrative proceedings resulting from an order of this Court, that remands this matter to the administrative agency, the Attorneys shall return all documents containing confidential information and any and all copies made of such documents, including any documents or copies held by persons authorized under this order to have access thereto, except for copies which contain work notes of the Attorneys or other authorized persons, which copies shall be destroyed. The return of such documents shall be accompanied by a certificate executed by a member of the firm of Howrey & Simon attesting that

the provisions of this paragraph have been complied with in all respects.

l. The Attorneys shall promply report any breach of the provisions of this stipulation to the Court; and it is further

Ordered that the confidential status of all those documents in the administrative record which have been designated as "business confidential" (including those listed in Exhibit 1) be maintained, except as provided above, until further order of this Court.

EXHIBIT 1

Administrative record page No.	Date	Description
38-73	03/14/83	Letter from A. Gutierrez to G. Horlick transmitting questionnaire response from Mexican Embassy.
180-192	04/28/83	Letter from A. Alfaro to S. Nyschot transmitting copies of microfiche export statistics and working papers used by Mexican Government to calculate exports.
244-279	06/13/83	Letter from A. Gutierrez to R. Moreland transmitting corrected portions of questionnaire response.
296-302	07/05/83	Calculation sheets for preliminary results of review.
303-393	07/08/83	Verification report (with exhibits).
621-624	011/08/83	Letter from I. Altschuler to A. Holmer giving his view on how CEDI and FOMEX benefits should be calculated.
673-680	01/16/84	Revised calculation sheets for Notice of Final Results.
681-684	03/07/84	Letter from I. Altschuler to A. Holmer stating that Ceramica Regiomontana's commercial loans in 1982 should be used at the benchmark rate.

(Slip Op. 84-132)

AMERICAN INSTITUTE FOR IMPORTED STEEL, INC., B.S. LIVINGSTON & COMPANY, INC., AND PRIMARY STEEL, INC., PLAINTIFFS, *v.* UNITED STATES, ET AL., DEFENDANTS, and LONE STAR STEEL COMPANY, DEFENDENT-INTERNVENOR, and LTV, STEEL COMPANY AND INLAND STEEL COMPANY, DEFENDENT-INTERVENORS, and BETHLEHEM STEEL CORPORATION, DEFENDENT-INTERVENOR, and UNITED STATES STEEL CORPORATION, DEFENDENT-INTERVENOR

Before: DICARLO, *Judge.*

Court No. 84-11-01673

MEMORADUM OPINION

Plaintiffs seek preliminary injunction against embargo of steel pipe and tube from the European Communities (EC).

Held: Plaintiffs have failed to demonstrate sufficient irreparable injury in complaining to additional wharfage, storage, and handling expenses due to defendants' actions.

Plaintiffs have no likelihood of success on the merits since: defendants complied with procedural requirements of section 805 of the Trade and Tariff Act of 1984 in limiting imports of steel pipe and tube from the European Communities (EC) to 5.9 percent of apparent domestic consumption for 1984; plaintiffs had actual and timely notice of the embargo and are, therefore, bound by the embargo though notice was published under the Administrative Procedure Act, 5 U.S.C. § 552(a)(1), and the Federal Register Act, 44 U.S.C. § 1501; defendants' actions in imposing the embargo are within the "foreign affairs function" exemption to the prior notice and comment provisions of the APA, 5 U.S.C. § 553; defendants are not in violation of the procedural requirements of the 1984 Trade Act and the APA and their actions were not, therefore, arbitrary and capricious under 5 U.S.C. § 706(a)(A); and defendants had authority under the 1984 Trade Act to impose the embargo, regardless of the status of the 1982 U.S.C.-EC arrangements to limit pipe and tube imports.

The public interest and balance of hardships also favor denying the injunction.

[Plaintiffs' motion for a preliminary injunction is denied.]

(Decided: December 5, 1984)

Graubard Moskovitz McGoldrick Dannett & Horowitz (Michael H. Greenberg, Beatrice A. Brickell and *Charles L. Rosenzweig)* for the plaintiff.

Richard K. Willard, Acting Assistant Attorney General; *David M. Cohen,* Director *(Velta A. Melnbrencis* on the brief), for the defendants.

Akin, Gump, Strauss, Hauer & Feld (Richard R. Rivers and Valerie A. Slater) for Defendent-Intervenor, Lone Star Steel Company.

Cravath, Swaine & Moore (Joseph R. Sahid) for the Defendant-Intervenors, LTV Steel Company and Inland Steel Company.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, Curtis H. Barnette, Laird D. Patterson, Benjamin R. Civiletti) for Defendent-Intervenor, Bethlehem Steel Corporation.

Law Department, United States Steel Corporation, (J.J. Mangan, C.D. Mallick, J.M. Jarboe, R.K. Capozzi, P.J. Koenig, on the brief) for Defendant-Intervenor, United States Steel Corporation.

DiCarlo, *Judge:* Plaintiffs, two importers of steel pipe and tube from the European Communities (EC) to the United States and a trade association of such importers, seek a preliminary injunction restraining defendants from denying entry to steel pipe and tube from the EC or its members states from November 29, 1984 through December 31, 1984.

The Court denied plaintiffs' application for a temporary restraining order after hearing argument on November 30, 1984. Motions by six domestic steel manufacturers to intervene as party-defendants were granted December 3 and 5, 1984. On December 5, 1984, following oral argument, the Court denied the motion.

BACKGROUND

On October 30, 1984, the President signed the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (the Act). Section 805(b) of the Act provides:

> (1) In connection with the provisions of the Arrangement on European Communities' Export of Pipes and Tubes to the United States of America, contained in an exchange of letters dated October 21, 1982, between representatives of the United States and the Commission of the European Communities, including any modification, clarification, extension, or successor agreement thereto (collectively referred to hereinafter as "the Arrangement"), the Secretary of Commerce is authorized to request the Secretary of the Treasury to take action pursuant to paragraph (2) of this subsection whenever he determines that—
>
> (A) the level of exports of pipes and tubes to the United States from the European Communities is exceeding the average of annual United States apparent consumption specified in the Arrangement, or
>
> (B) distortion is occurring in the pattern of United States-European Communities trade within the pipe and tube sector taking into account the average share of annual United States apparent consumption accounted for by European Communities articles within product categories developed by the Secretary of Commerce.
>
> Any request to the Secretary of the Treasury pursuant to this subsection by the Secretary of Commerce shall identify one or more categories of pipe and tube products with respect to which action under paragraph (2) is requested.
>
> (2) At the request of the Secretary of Commerce pursuant to paragraph (1) the Secretary of the Treasury shall take such action as may be necessary to ensure that the aggregate quantity of European Communities articles in each product category identified by the Secretary of Commerce in such request that are entered into the United States are in accordance with the terms of the Arrangement.

By letter dated November 14, 1984, the Secretary of Commerce requested the Secretary of the Treasury to direct the Customs Service to prohibit, effective November 20, 1984, entries of EC pipe and tube from November 29 to December 31, 1984, pursuant to section 805(b)(1)(A) of the Act.[1]

An undated telex was sent by the Assistant Commissioner of Customs for Commercial Operations ordering that no further en-

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[1] In that letter, Secretary of Commerce Malcolm Baldrige determined that the level of steel pipe and tube steel imports from the EC was exceeding the level stated in the arrangement. He also determined that in the first eight months of 1984, imports of pipe and tube from the EC accounted for 14.4 percent of United States apparent consumption for the period. Under the arrangement, the EC agreed not to exceed their 1979-1981 average share of annual U.S. apparent domestic consumption for pipe and tube products. Pipe and tube imports from the EC countries in 1979-1981 averaged 5.9 percent of ths U.S. market.

The exchanged letters referred to in section 805(b)(1) of the Act, stating the arrangement, are reprinted at *United States-European Communities Steel Pipe and Tube Imports Agreement: Hearings Before the Subcom. on International Trade of the Senate Finance Comm.*, 98th Cong., 1st Sess. 58 (1983).

tries or warehouse withdrawals of steel pipe and tube from the EC classified under TSUS items 610.30 through 610.52 were to be accepted after November 19, 1984. Implementation of the embargo was subsequently postponed by a second undated telex to 12:01 a.m. November 29, 1984.

Defendants contend that Secretary Baldrige's letter and the Customs telexes were made available to the public on or about the date of their original transmission.[2]

Plaintiffs B.S. Livingston and Company and Primary Steel, Inc. allege that they have shipmens of Steel pipe and tube from the EC at sea due to arrive at Houston, Texas on December 5 which will not be allowed entry until January 1, 1985. They claim they will incur costs of wharfage, storage, handling and interest involved in putting the merchandise in Customs bonded warehouses if prevented from making delivery; that their customers may cancel contracts forcing sale of the merchandise at a substantial loss; and injury to their reputation as reliable suppliers.

Plaintiffs challenge the embargo on four grounds. They allege that: (1) defendants failed to comply with procedural requirements of section 805 of the Trade and Tariff Act of 1984; (2) defendants failed to comply with the publication provisions of the Federal Register Act (FRA), 44 U.S.C. § 1501 (1982), the publication requirement of the Administrative Procedure Act (APA), 5 U.S.C. § 552 (1982) and the notice and comment provisions of the APA, 5 U.S.C. § 553 (1982); (3) defendants' actions are arbitrary, capricious and unsupported by valid administrative purpose, and, therefore, null and void under 5 U.S.C. § 706(2)(A) (1982); and, (4) since section 805 of the Act gives the administration authority to enforce an arrangement with the EC to limit EC steel imports into the U.S., and since that arrangement has been denounced by the EC, defendants' actions to enforce the arrangement are a nullity.

The plaintiffs invoke the Court's jurisdiction under 28 U.S.C. § 1581(i) (3) and (4).

The Preliminary Injunction

In order to prevail on this motion, plaintiffs must show (1) threat of immediate irreparable harm; (2) likelihood of success on the merits; (3) that the public interest would be better served by issuing rather than by denying the injunction; and, (4) the balance of hardships on the parties favors issuing the injunction. *Zenith Radio Corp* v. *United States*, 710 F.2d 806, 809 (Fed. Cir. 1983); *see S.J. Stile Associates, Ltd.* v. *Snyder*, 68 CCPA 27, 30, 646 F.2d 522, 525 (1981); *American Air Parcel Forwarding Co.* v. *United States*, 1

[2] A news release by William E. Brock, United States Trade Representative, on November 27, 1984, described the actions to be taken effective November 29, 1984. Defendants assert that both telexes were distributed to the importing community by a variety of methods on November 19, 1984. Affidavit of John Martuge, Acting Director, Duty Assessment Division, United States Customs Service, Exhibit 8 to Defendants' Opposition to Plaintiffs' Request for a Preliminary Injunction.

CIT 293, 297-301, 515 F.Supp. 47, 52-55 (1981) (discussing the relative weight accorded to each factor).

Plaintiffs must make a clear showing that they are entitled to this relief. *Asher* v. *Laird*, 414 F.2d 360, 362 (D.C. Cir. 1973);l *Dijub Leasing Corp.* v. *United States*, 1 CIT 42, 51, 505 F.Supp. 1113, 1120 (1980).

A. Irreparable Injury

Plaintiffs allege that they will be liable for various wharfage, handling and storage expenses they would not have incurred but for the embargo.

In *S.J. Stile Associates, Ltd.*, v. *Snyder*, 68 CCPA 27, 646 F.2d 522 (1981), the Court of Customs and Patent Appeals held that an increase in business expenses alone is not irreparable injury.

> In essence, the [plaintiff] brokers invoke the equitable powers of the court to stop an action of the Customs Service on the sole ground that the action would cause some increase in their business expenses . . . Nothing in the law requires that the Secretary or the Customs Service insure against an increase of business expenses of customs brokers. *Thus solid proof that increased expenses would be certain, had the same been addressed, would not alone justify the injuction sought.*

S.J. Stile Associates Ltd., 68 CCPA at 30, 646 F.2d at 525-526 (footnotes omitted) (emphasis added).

Plaintiffs also claim that delay caused by the embargo may result in cancellation of existing contracts and damage their reputation as reliable suppliers.

The plaintiffs have produced no evidence that these additional injuries would occur. They have made no showing that delays of less than a month would violate the terms of any contract. They have made no showing that time is of the essence in any contract. They have not shown that they could not substitute other steel products either from their own inventories or from other sources and thereby eliminate potential customer dissatisfaction. The Court does not know whether the parties to these contracts have provided for delays in their agreements in the event of government action.

Where irreparable injury is not demonstrated by "probative evidence" a preliminary injunction should be denied. *See American Spring Wire Corp.* v. *United States*, 7 CIT ——, 578 F.Supp. 1405, 1408 (1984); *American Air Parcel Forwarding Company, Ltd.* v. *United States*, 1 CIT 293, 298, 515 F.Supp. 47, 52 (1981) (plaintiffs bear "heavy burden of producing evidence" on motion for preliminary injunction).

The Court holds that plaintiffs have failed to demonstrate the necessary irreparable harm.

B. Likelihood of Success on the Merits

It is unnecessary for plaintiffs to establish likelihood of success on the merits with "mathematical probability." *Committee to Preserve American Color Television and Imports Committee* v. *United States*, 4 CIT 202, 204, 551 F.Supp. 1142, 1144 (1982). However, in this case, the Court finds there is no likelihood of success on the merits.

Plaintiffs first cause of action is that defendants failed to comply with the procedural requirements of section 805 of the Act since no determination was made by the Secretary of Commerce as required by subsection (b)(1); no request has been made by the Secretary of Commerce to the Secretary of the Treasury as required by subsection (b)(1); and no action has been taken by the Secretary of the Treasury as required by subsection (b)(2).

The November 14, 1984, letter from the Secretary of Commerce to the Secretary of the Treasury explicitly made the determination and request required by section 805(b) (1), (2) [3] and the subsequent Customs telexes constitute the action taken at the direction of the Secretary of the Treasury pursuant to subsection (b)(2).

Plaintiffs also allege in their first cause of action that no regulations have been promulgated by defendants under section 805(c). That subsection provides:

> For purposes of carrying out this title, the Secretary of the Treasury *may provide* by regulation for the terms and conditions under which steel products may be denied entry into the United States.

Pub. L. 98–573, § 805(c), 98 Stat.—— (emphasis added).

There is no requirement that the Secretary of the Treasury promulgate such regulations.

Since defendants have complied with the procedural requirements of section 805, plaintiffs' first cause of action has no likelihood of success.

Plaintiffs' second cause of action is that the defendants have not complied with the requirements for publication of the Federal Register Act, 44 U.S.C. § 1501 and requirements for publication, 5 U.S.C. § 552 and prior notice and comment, 5 U.S.C. § 553, of the Administrative Procedure Act.

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[3] That letter states in part:

I determine, in accordance with section 805(b)(1)(A) of the Trade and Tariff Act of 1984, that the level of exports of all pipes and tubes to the United States from the EC is exceeding the average share of annual United States apparent consumption specified in the arrangement. I also determine in accordance with Section 805(b)(1)(B) of the new law that distortion is occurring in the pattern of U.S.-EC trade within the pipe and tube sector, taking into account the average share of annual U.S. apparent consumption accounted for by EC exports of the United States * * *.

Consequently, I request that you take the necessary actions as specified in Section 805(b)(2) of the Trade and Tariff Act of 1984, to ensure that the terms of the arrangement are met. Specifically, I request that you direct Customs Service offficials to prohibit, effective November 20, 1984, further entries for consumption or withdrawals from warehouse for consumption for the remainder of 1984 for EC pipe and tube.

See Exhibit 4 of Defendant's Memorandum in Opposition to Plaintiffs' Request for a Preliminary Injunction.

Plaintiffs conceded at oral argument that the FRA required publication of any documents involved in this action only if the APA required such publication.[4]

5 U.S.C. § 552(a)(1)(D) [5] requires an agency to publish in the *Federal Register*—

> Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency * * *
>
> Section 552(a)(1) continues:
>
> Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.

Plaintiffs argue that the Customs actions in imposing the embargo were "substantive rules of general applicability."

Assuming *arguendo* that the government action here—of limited duration affecting a small, sophisticated community importing a particular kind of steel from particular countries—is within section 552(a)(1)(D), plaintiffs had actual and timely notice of the action and are bound by the embargo. *See Yassini* v. *Crosland,* 618 F.2d 1356, 1361-1362 (9th Cir. 1980); *United States* v. *Mowat,* 582 F.2d 1194, 1201 (9th Cir. 1978). *Cf. United States* v. *Aarons,* 310 F.2d 341, 348 (2d Cir. 1962) (actual notice).

The decision to implement the embargo was not made until November 14, 1984. Defendants state that Secretary Baldrige's letter of November 14, 1984 and the two undated telexes were made available to the public. Plaintiffs had actual notice of defendants decision to implement the embargo before the embargo went into effect.[6] Plaintiffs make no showing of prejudice and their notice is, therefore, timely. *See Neighborhood Legal Services, Inc.* v. *Legal Services Corp.,* 466 F.Supp. 1148, 1154 (D.Conn. 1979).[7]

Plaintiffs also allege as part of their second cause of action that defendants failed to provide notices and opportunity for public comment on the action, as required by 5 U.S.C. § 553.

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[4] Section 5(a) of the Federal Register Act, 44 U.S.C. § 1505(a) (1982), requires the following to be published in the *Federal Register:*

> (1) Presidential proclamations and Executive orders, except those not having general applicability and legal effect * * *
>
> (2) documents or classes of documents that the President may determine from time to time to have general applicability and legal effect; and
>
> (3) documents or classes of documents that may be required so to be published by Act of Congress.
>
> For the purposes of this chapter every document or order which prescribes a penalty has general applicability and legal effect.

The plaintiffs contend that only subsection (3) has applicability here.

[5] Plaintiffs make no argument that 5 U.S.C. § 552(a)(1) (A)-(C) applies.

[6] Plaintiffs' affidavits annexed to its Order to Show Cause were executed November 28, 1984.

[7] Plaintiffs rely on *Anderson* v. *Butz,* 550 F.2d 459 (D.C. Cir. 1977), where implementation of an instruction interpreting a regulation was enjoined pending publication in the *Federal Register.* "If the Ninth Circuit also meant that failure to comply with a § 552 publication requirement concerning a grant-making policy renders such a policy void even though the applicant learns of the policy and is not prejudiced by lack of publication, this Court respectfully disagrees." *Neighborhood Legal Services, Inc.* v. *Legal Services Corp.,* 466 F.Supp. 1148, 1154 (D.Conn. 1979). This Court concurs.

Assuming *arguendo* that the imposition of the embargo was a "rules," and its formulation "rulemaking," within the ambit of section 553,[8] section 553(a)(1) exempts from notice and comment rulemaking "to the extent that there is involved a military or foreign affairs function of the United States."

In *Mast Industries, Inc.* v. *Regan,* 8 CIT ——, Slip Op. 84-111 (Oct. 4, 1984), *appeal docketed,* No. 85-748 (Fed. Cir. Nov. 8, 1984), this Court held that Customs regulations defining country of origin of textile products subject to quota under bilateral agreements or unilaterally imposed restraints involved a foreign affairs function within the meaning of section 553(a)(1), and were exempt from the prior notice and comment requirements of section 553.

As in *Mast,* the action challenged here clearly and directly goes to the purpose of an international agreement: limiting imports. The embargo of EC steel pipe and tube implements Congress' direction that the U.S.-EC arrangement be enforced and is, therefore, a foreign affairs function.

Plaintiffs' third cause of action is that the embargo should be declared void under 5 U.S.C. § 706(2)(A) which states that a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."

Plaintiffs argue that since defendants failed to make or publish the determinations and rules required by the statute and to afford plaintiffs notice and an opportunity to comment in accordance with the APA, the embargo is arbitrary and capricious.

Since the Court finds that the defendants made the required determinations and their actions were properly exempt from the publication, notice, and comment provisions of the APA, the Court finds no likelihood of success on plaintiffs' third cause of action.

Plaintiffs' fourth cause of action that the embargo is null and void because the U.S.-EC arrangement is no longer in effect.

Plaintiffs allege that on November 27, 1984, the EC delivered a letter to U.S. Ambassador George Vest in Brussels, Belgium, terminating the pipe and tube arrangement referred to in the Act.

On November 29, 1984, Secretaries Baldrige and Regan notified the EC that the United States considers that the arrangement remains in force. Defendants also argue that Customs was ordered to prohibit the entry of EC pipe and tube steel before the EC announced the termination of the treaty.

The current status of the arrangement is not relevant to plaintiffs' claim. The administration derives its authority not from the arrangement, but from the Act, passed by Congress. *Cf. Mast Industries, Inc.* v. *Regan,* 8 CIT ——, Slip Op. 84-111 (Oct. 4, 1984),

[8] Section 553 applies to agency rulemaking. "Rulemaking" is defined as "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). The APA defines "rule" to mean "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."

appeal docketed, No. 85-748 (Fed. Cir. Nov. 8, 1984) (President's authority to limit textile imports derived from section 204 of the Agricultural Act of 1956, 7 U.S.C. § 1854, not international agreements). In effect, Congress granted the Administration authority to limit annual imports of EC steel pipe and tube to 5.9 percent of U.S. apparent consumption. The actions taken by the Secretaries of Commerce and the Treasury are in accordance with that authority.

The Court holds that plaintiffs' fourth cause of action has no likelihood of success.

C. Public interest

In determining whether the public interest would be better served by issuing rather than denying the injunction, the Court takes cognizance of Congress' judgment that enforcement of the terms of the U.S.-EC arrangement serves the public interest. Following lengthy consideration of the matter, Congress, less than two months ago, provided the Administration with authority to take the action plaintiffs now challenge. Congress determined that limitation of steel imports, including pipe and tube from the EC, to protect the domestic steel industry, is in the public interest. *See* the Act of sections 802 ("full and effective implementation of the national policy for the steel industry will substantially improve the economy and employment in both the steel and iron ore-producing sectors") and 803 ("Sense of Congress Regarding the National Policy for the Steel Industry"); *Remarks of President Reagan in Signing the Omnibus Trade Bill Oct. 30, 1984,* 7 Business America, Nov. 12, 1984 at inside front cover (the Act will "help keep the United States from becoming the world's steel dump").

The Court holds that the public interest is best served by denying the injunction.

D. Balance of the Hardships

In balancing the hardships the Court must consider whether granting the preliminary injunction would give plaintiff all or most of the relief to which it would be entitled if it were to succeed at trial. *Dorfman* v. *Boozer,* 414 F.2d 1168, 1173 n.13 (D.C.Cir. 1969); *Knapp* v. *Walden,* 367 F. Supp. 385, 388 (S.D.N.Y. 1973).

The embargo is to expire January 1, 1985, Granting plaintiffs' motion would be effectively granting them all the relief they seek.

Defendants allege that if the injunction were granted, there would be substantial risk of irreparable harm to domestic producers of steel pipe and tube, since significant quantities of EC steel pipe and tube would be imported.

The Court finds that the balance of hardships favor the defendant.

Conclusion

Since the Court finds that plaintiff will suffer no irreparable injury, has no likelihood of success, that the public interest is best served by enforcement of the arrangement and that the balance of the hardships favor the defendant, the motion for preliminary injunction is denied.

(Slip Op. 84-133)

Mattel, Inc., plaintiff, *v.* United States, defendant

(Court No. 80-3-00425)

Before: Carman, *Judge.*

Opinion and Order

[Judgment for plaintiff.]

(Decided: December 11, 1984)

Stein, Shostak, Shostak & O'Hara (Majorie M. Shostak at the trial) for the plaintiff.

Richard K. Willard, Acting Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division (*Deborah E. Rand* at the trial) for the defendant.

Carman, *Judge*: The question presented in this case pertains to the proper classification, for customs duty purposes, of certain merchandise imported from the Philippines and described on the customs invoices as a "base stand and leg holder" for use with the "Pretty Changes Barbie" doll.[1]

The merchandise was classified by the United States Customs Service (Customs) as "[d]olls and parts of dolls, including doll clothing * * * Other," under item 737.22 of the 1978 Tariff Schedules of the United States (TSUS), and assessed with duty at the rate of 17.5 percent ad valorem.

Plaintiff contests this classification and maintains that the merchandise is properly classifiable under item A774.60 of the 1978 TSUS as "[a]rticles not specially provided for, of rubber or plastics * * * Other," and should be entitled to duty-free treatment under the Generalized System of Preferences (GSP).

The parties agree, as does the Court, that the controlling question presented by this case is whether the base stand and leg holder are properly classifiable as "entireties" with the imported dolls as that concept is understood in customs law. In reaching this issue, the Court notes that it must consider "whether the government's classification is correct, both independently and in compari-

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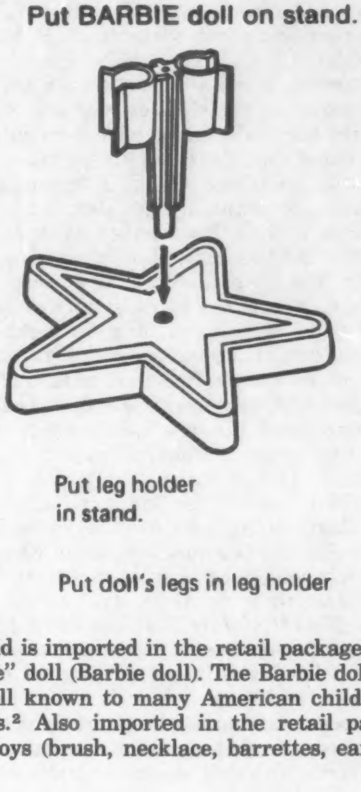
[1] At the trial of this action, the Court accepted an application on behalf of plaintiff to amend paragraph 3 of the complaint as well as all other matters of the complaint pertaining to the "Kissing Barbie" doll and substitute therefor the "Pretty Changes Barbie" doll.

son with the importer's alternative." *Jarvis Clark Co.* v. *United States,* 733 F.2d 873, 878 (Fed. Cir. 1984).

After reviewing the trial testimony, the merchandise taken into evidence, and the applicable authorities, the Court holds that plaintiff has overcome the presumption of correctness attaching to Customs' classification. *See* 28 U.S.C. § 2639(a)(1) (1982). Further, plaintiff has shown its proposed alternative classification to be sustainable. *See Jarvis Clark Co.,* 733 F.2d at 878.

The plastic base stand and leg holder (doll stand) that is the subject of this action, represented ini Plaintiff's Exhibit 2, is illustrated below:



The doll stand is imported in the retail package with the "Pretty Changes Barbie" doll (Barbie doll). The Barbie doll is, of course, an activity toy well known to many American children as well as to adult collectors.[2] Also imported in the retail package were doll clothing, doll toys (brush, necklace, barrettes, earrings, pin, ring),

[2] One witness for the plaintiff, a mechanical engineer employed by Mattel, estimated that every girl in the United States owns approximately two-and-one-half Barbie dolls. *See* Transcript at 62.

printed instructions, and two wigs.[3] The doll stand, when assembled, holds the doll in an upright position.

Customs found that the doll stand along with the Barbie doll constituted an entirety for classification purposes. That finding is presumptively correct. *See United States* v. *New York Merchandise Co.*, 58 CCPA 53, 58, 435 F.2d 1315, 1318 (1970).

Under the relevant case law pertaining to the doctrine of entireties, a few guiding, though somewhat discordant, principles emerge. First, if the imported articles, when combined, nevertheless retain their individual identities and do not become subordinated to the whole, then the articles are not dutiable as an entirety. *Donalds, Ltd., Inc.* v. *United States,* 32 Cust. Ct. 310, 315 (1954).[4] Also, if the articles, in combination, form a new article with a different character or use from the parts, an entirety results. *E.M. Stevens Corp.* v. *United States,* 49 Cust. Ct. 203, 204 (1962), *appeal dismissed,* 53 CCPA 155 (1966). Further, if one part is "merely incidental to the predominant part insofar as the character or use of the combination is concerned," the parts will be considered an entirety. *Id.*

Other cases have noted that if articles have a "natural affinity or relation" to each other, or if one article is "essential to the completeness" of the other, then the articles should be considered an entirety. *United States* v. *John Wanamaker, Philadelphia, Inc.*, 20 CCPA 367, 369 (1933). An early leading case, *Altman & Co.* v. *United States,* 13 Ct. Cust. Appls. 315 (1925), seems to endorse a less rigorous standard. There, the court simply stated that if the parts are designed to be joined and form a "complete article of commerce," they should be treated as entireties. *Id.* at 318.

Finally, courts must be wary of the fluid nature of the doctrine. Other decisions repeatedly have cautioned that analogies to past cases may be unreliable and that the multiple fact patterns possible under the doctrine make mechanical application unwise. *See Charles Garcia & Co.* v. *United States,* 37 Cust. Ct. 117, 119 (1956), *aff'd,* 45 CCPA 1 (1957). Indeed, the Court of Customs and Patent Appeals (now the Court of Appeals for the Federal Circuit) has stated that "the doctrine of entireties, because of its scope, can lead to two contrary conclusions depending on what criteria are given controlling effect." *Miniature Fashions, Inc.* v. *United States,* 54 CCPA 11, 17 (1966). The *Miniature Fashions* court also placed the doctrine in its proper perspective. It is merely an aid in the construction of the tariff laws. The intent of Congress is the one controlling criterion. *See id* at 16.

As discussed in more detail below, the Court finds that in light of the evidence presented, the doll stands are separate, distinct and complete in themselves. The doll stands and the dolls cannot be

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[3] The various ornamental items contained in the retail sales package were classified under TSUS provisions for toys and wigs. *See Mattel, Inc.* v. *United States,* 61 Cust. Ct. 75, 287 F. Supp. 999 (1968).

[4] For the customs law doctrine of entireties to obtain, the articles must be imported together, as in the present case. *See Franklin Indus., Inc.* v. *United States,* 1 CIT 349, 350–51 (1981).

considered an entirety for tariff purposes because, when merged, they do not form a new and distinct article of commerce having a different character or use. Further, because neither is essential to the completeness of the other, and since neither bears a natural affinity or relation to the other, they must be classified and assessed duty separately. *See Wm. Adams, Inc.* v. *United States,* 5 Cust. Ct. 239, 241 (1940); *see also Issac* v. *Jonas,* 148 U.S. 648, 653 (1892).

Plaintiff presented ample evidence that the doll stands, in and of themselves, have extrinsic value and identity. First, the stands can be used with other dolls from the Barbie line, the Mattel brand, as well as with dolls from other manufacturers. Plaintiff's Exhibit 3 is an "India Barbie" doll. It was demonstrated in court that the stand imported with the "Pretty Changes Barbie" doll would also support the "India Barbie" doll. *See* Transcript at 25–26. Further, plaintiff's exhibits 10, 11, 12, and 13, all dolls manufactured by other companies, are capable of being used with the plastic doll stand in issue here. Such interchangeability of use weighs against a finding of entireties. *See Craig Panorama, Inc.* v. *United States,* 59 Cust. Ct. 97, 101 (1967) (batteries not entireties with the imported radios).

In addition, the fact that the stand can be used with other merchandise than that with which it was imported establishes that the stand does not merge with the doll when combined and does not lose its identity to form a new article of commerce. *Id.*

Defendant attempted to establish that somehow the doll stand is a crucial element, unique to the "Pretty Changes Barbie" doll. Defendant's position is that a predominant play feature of the "Pretty Changes Barbie" doll is its ability to be posed. According to defendant, this particular Barbie doll is meant to be displayed with the various clothing and accessories, and the stand is essential to this function. This line of reasoning, however, ignores the larger function of the doll which involves a more active mode of play activity; namely, the changing of clothes and hair styles. The doll stand is in no way "essential" to play activities with the doll. *See* Transcript at 125, 298.[5]

The court also finds that neither component at issue here is essential to the completeness of the other. Upon careful examination of Plaintiff's Exhibit 1, it appears self-evident to the Court, and plaintiff has presented credible evidence on the point, that the Barbie doll is a complete doll in its imported condition. The Barbie doll can be used in play wholly apart from the doll stand. *See* Transcript at 126, 150–51. Its clothing, jewelry, and hair can be changed. It can be posed in numerous positions. Other accessories are available separately and are used with the doll. *See* Transcript at 124. Also, as explained above, the doll stand is a commercially viable

[5] As to the issue of how a child plays with a Barbie, or any other, doll plaintiff called two witnesses, both employees of Mattel. The witnesses testified that the doll stand was not an important aspect of play, and that, in fact, children rarely played with the dolls by using the stands. Transcript, at 43, 47, 96–97. The Court finds this testimony credible since, in part, it is based on marketing experiments observed by the witnesses.

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entity by itself. Under the applicable legal test, therefore, the two components do not depend on each other for their completeness. *See Hancock Gross Mfg., Inc.* v. *United States,* 60 Cust. Ct. 558, 564–65 (1968). "The mere fact that two articles are designed and constructed to be used together does not necessarily make either a part of the other." *Craig Panorama,* 59 Cust. Ct. at 101.

Defendant presented considerable evidence on the point that the Barbie doll cannot stand independent of some other instrumentality. It was never established, however, that independent standing capability affects the usefulness of the doll from a child's play perspective. It certainly does not render the doll incomplete. Indeed, that the Barbie doll cannot stand without being proped up is largely irrelevant. Only about 5 percent of the various Barbie doll lines are sold with doll stands. *See* Transcript at 55. This certainly indicates that the stands are not essential to the doll's utility as a plaything.

Defendant also pointed to examples of various advertising for the Barbie doll attempting to demonstrate the prominent value of the doll stand. On Plaintiff's Exhibit 1, defendant notes, the side and rear panels of the retail package show the stand in use with the doll. This display, however, is equivocal at best since the doll stand is not depicted on the front of the retail package. The front of the box is the most important for advertising purposes. *See* Transcript at 111–12.

The Court now reviews several of the reported cases on the entireties doctrine to illustrate the proper applications of the concept.

In *Donalds, Ltd., Inc.* v. *United States,* 32 Cust. Ct. 310 (1954), the court was faced with the question whether components of certain inhalers, used for medicinal purposes to clear up congestion, were classifiable as entireties. The merchandise, imported as a single unit, consisted of a holder, cotton core, and inhalant. Applying the doctrine of entireties to the importation, the court determined that the three parts had been subordinated to form a new commercial entity. *Id.* at 315.

Quite naturally, the court, in *Yardley and Co., Ltd.* v. *United States,* 22 CCPA 390 (1934), found that glass jars along with the covering lids, though packaged separately, were entireties for classification purposes.

Where the rate of duty for lithographed paper depended on the thickness of the item, the several sheets of a calendar were considered an entirety. *Nippon Ysen Kaisha* v. *United States,* 12 Ct. Cust. Appls. 5 (1923).

In *Artgift Corp.* v. *United States,* 30 Cust. Ct. 372 (1953), glass domes imported along with metal statuettes were held to be an entirety. The court there found that either of the components, considered alone, was commercially useless. The court also determined that when combined, a new article of commerce was formed. *Id.* at 373–74.

The two component parts of a bell, namely, the outer bell-shaped portion and the metal mallet for striking, are dutiable as an entirety. *United States* v. *F. W. Woolworth Co.,* 23 CCPA 365 (1936).

On the other side of the coin, and perhaps closer to the present controversy, are the cases involving containers. In *United States* v. *Hensel, Bruckmann & Lorbocher, Inc.,* 22 CCPA 281 (1934), the court held that leather binocular cases, imported with the companion binoculars, were not dutiable as entireties since no new article emerged from the combination. *Id.* at 285.

Similarly, bottles for perfume and the boxes in which the bottles would be sold to the ultimate consumer are not assessable as entireties since each article is a separate, distinct and complete entity. *Coty Processing Co.* v. *United States,* 23 CCPA 117, 121 (1935).

The various components of a croquet set: balls, mallets, and other equipment, are not dutiable as entireties. Each article has a separate identity and value. *See Abercrombie & Fitch Co.* v. *United States,* 10 Cust. Ct. 222, 226 (1943).

Statuettes designed to hold burning incense, imported with the incense itself, is not classifiable as an entirety. Because the two items had uses and identities apart from each other, they were deemed not to be entireties for duty purposes. *See Dow Co.* v. *United States,* 11 Ct. Cust. Appls. 249, 251 (1922).

Recently, the Court of International Trade had occasion to consider the doctrine of entireties. In *Fisher Galleries* v. *United States,* 8 CIT —, 593 F. Supp. 436 (1984), plaintiff imported certain silk and tapestry remnants from the People's Republic of China. The articles were more than 100 years old, and, therefore, free entry was sought under the provisions for antiques. The issue presented involved whether certain "borders and backings," not of antique origin, and attached to the remnants, disqualified the merchandise from duty-free treatment. 8 CIT at —, 593 F. Supp. at 438. Judge Ford, employing the doctrine of entireties, held that because the combination created no new article of commerce, the items were dutiable separately. The court found it significant that the relative value between the remnants and the borders was highly disproportionate. The court was also impressed by evidence demonstrating that the borders often were discarded after a sale. Consequently, the remnants were granted duty-free treatment as antiques, and the matter was remanded to Customs for proper classification of the border and backings. *Id.* at —, 593 F. Supp. at 440.

These cases disclose the natural uses and applications of the entireties doctrine. A jar and its lid; a toy ship in a bottle—this class of merchandise forms a new commercial entity when combined.

Binoculars and a leather case, the items in a croquet set—these are items that retain their individual identities even when combined. They do not merge into the whole to form a new commercial entity having a different character or use. The doll stand and doll

fall into this latter category. Each item is separate and complete unto itself. The "Pretty Changes Barbie" doll when employed with the stand does not form a new commercial entity. The stand merely supplements the play activities of the doll. Nor does the stand bear a "natural affinity or relation" to the doll as that term has been traditionally used and understood. *See Selsi Co.* v. *United States,* 2 Cust. Ct. 371, 376 (1939) (weather sets consisting of barometers with thermometers attached not classifiable as entireties).

Therefore, under any of the traditional tests: "function," "use," "individual entities," "newly created entity," "intent," "design," or "commercial unit," the doll stands are not classifiable as entireties with the Barbie doll. *See Minature Fashions, Inc.* v. *United States,* 54 CCPA 11, 16 (1966).

If Congress had provided for doll stands eo nomine in the TSUS, the Court would have little difficulty in placing the merchandise under such a provision. Nevertheless, the Court is convinced that classification under item A774.60 as articles of rubber or plastics, not specially provided for, is appropriate.

Conclusion

It is the determination of this Court that the presumption of correctness that attaches to Customs' classification has been overcome. The "base stand and leg holder," the subject merchandise of this action, was erroneously classified under item 737.22, TSUS, providing for dolls and parts of dolls; classification is proper under item A774.60 of the TSUS, and the subject merchandise is entitled to duty-free entry under the GSP.

Judgment accordingly.

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Decision Number	Judge & Date of Decision	Plaintiff	Court No.	Ass
				Item No.
P84/367	Re, C.J. December 5, 1984	Zayre Corp.	83-10-01418	Item 737 17.1%
P94/368	Ford, J. December 5, 1984	J.E. Mamiye & Sons	82-11-01566	Item 389 15% + lb.

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Abstracts

DEPARTMENT OF THE TREASURY, *December 12, 1984.*

United States Court of International Trade at New York are f officers of the customs and other concerned. Although the o print in full, the summary herein given will be of assistance racing important facts.

WILLIAM VON RAAB,
Commissioner of Customs.

CTED PROTEST DECISIONS

Assessed	Held	Basis	Port of Entry and Merchandise
tem No. and Rate	Item No. and Rate		
tem 737.80 17.1%	Item 737.45 9.7%	Agreed statement of facts	Boston Lullaby Lamb Musical Crib Rail Toy
tem 389.62 15% + 25¢ per lb.	Item 706.24 20%	J.E. Mamiye Sons v. U.S. (C.D. 4878)	New York Tote bags

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ABSTRACTED

Decision number	Judge & date of decision	Plaintiff	Court No.	Basis
R84/433	Watson, J. December 5, 1984	Kaysons International Ltd.	R63/5301, etc.	Export

of the United States
International Trade

Abstracts

CTED REAPPRAISEMENT DECISIONS

Basis of valuation	Held value	Basis	Port of entry and merchandise
Export value	Various f.o.b. invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values, net packed for items marked A Various appraised unit values less 7.5% thereof, net packed for items marked B	Agreed statement of facts	Detroit Chinaware, marked A and B

ABSTRACTED REAPPRAISEN

Decision number	Judge & date of decision	Plaintiff	Court No.	Basis of valuatio
R84/434	Watson, J. December 5, 1984	National Fittings Co.	R62/8549, etc.	Export value
R84/435	Watson, J. December 10, 1984	American Commercial Inc.	R64/7582, etc.	Export value
R84/436	Watson, J. December 10, 1984	Irving Blitz & Associates	R65/16995, etc.	Export value
R84/437	Watson, J. December 10, 1984	John L. Westland & Son	R61/13797, etc.	Export value
R84/438	Watson, J. December 10, 1984	John L. Westland & Son	R61/19589	Export value
R84/439	Watson, J. December 10, 1984	Madison Import Co.	R60/20785, etc.	Export value
R84/440	Watson, J. December 10, 1984	Mattoon & Co.	R61/7546	Export value

AISEMENT DECISIONS—Continued

aluation	Held value	Basis	Port of entry and merchandise
e	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Pipe fittings
e	Various appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Los Angeles Dinnerware
e	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Batteries
e	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Transistor radios & accessories, entirety
e	Various appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Los Angeles Transistor radios & accessories, entirety
e	Various appraised values less 7.5% thereof, net packed	Agreed statement of facts	Los Angeles Transistor radios & accessories, entirety
e	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	San Francisco Transistor radios & accessories, entirety

R84/441	Watson, J. December 10, 1984	New York Merchandise Co.	R60/1809, etc.	Export value	F
R84/442	Watson, J. December 10, 1984	New York Merchandise Co.	R63/11686, etc.	Export value	F
R84/443	Watson, J. December 10, 1984	Panorama Enterprises, Inc.	R62/9674	Export value	V
R84/444	Watson, J. December 10, 1984	Southern Precision Instrument Co.	R61/1067	Export value	F
R84/445	Watson, J. December 10, 1984	United Silver & Cutlery Co.	R60/14053	Export value	F
R84/446	Watson, J. December 11, 1984	John L. Westland & Son	R59/186, etc.	Export value	F
R84/447	Watson, J. December 11, 1984	John L. Westland & Son	R60/10391	Export value	V

F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Transistor radios & accessories, entirety
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Portland, Oreg. Transistor radios & accessories, entirety
Various appraised unit values less 7.5% thereof net packed	Agreed statement of facts	Los Angeles Transistor radios & accessories, entirety
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Transistor radios & accessories, entirety
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Transistor radios & accessories, entirety
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Binoculars
Various appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Los Angeles Flatware

ABSTRACTED REAPPR

Decision number	Judge & date of decision	Plaintiff	Court No.	Basis of
R84/448	Watson, J. December 11, 1984	Kaysons International Ltd.	R63/7077	Export val
R84/449	Watson, J. December 11, 1984	May Department Stores, Inc.	253154A, etc.	Export val
R84/450	Watson, J. December 11, 1984	New York Merchandise Co.	R59/11864	Export val
R84/451	Watson, J. December 11, 1984	New York Merchandise Co.	R63/15865	Export val
R84/452	Watson, J. December 11, 1984	Panorama Enterprises, Inc.	R60/15631	Export val

APPRAISEMENT DECISIONS—Continued

Basis of valuation	Held value	Basis	Port of entry and merchandise
port value	Various f.o.b. invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values, net packed for items marked A Various appraised unit values less 7.5% thereof, net packed for items marked B	Agreed statement of facts	New Orleans Chinaware
port value	Various f.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values, net packed	Agreed statement of facts	Los Angeles Flatware
port value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Cotton articles
port value	Various appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	San Diego Dinnerware
port value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Binoculars

R84/453	Watson, J. December 11, 1984	United States & Cutlery Co.	R59/15859, etc.	Export value	F.o.b plu bet voi pra
R84/454	Watson, J. December 11, 1984	Western Pacific Import Co.	R59/18671	Export value	Vari val net

F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Transistor radios & accessories, entirety
Various appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Los Angeles Tableware-flatware

Appeal to the U.S. Court of Appeals for the Federal Circuit

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U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

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